Supreme Court, U.S.
FILED

03 264 APR 30 2003

No._____

IN THE

SUPREME COURT OF THE UNITED STATES

JOHN DAVID GEREMIA

Petitioner

vs.

LAS VEGAS METROPOLITAN POLICE DEPARTMENT; DETECTIVE T. BALL; WILLIAM TULLOS; JOANN TULLOS; and WILLIAM MOMA,

Respondents

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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IN PRO SE

100 pp

I. QUESTIONS PRESENTED FOR REVIEW

A. Did the 9th Circuit error when they refused to allow a pro se litigant to submit a 'Declaration of Arrest' in plaintiffs reply to impeach the Police Department's argument that there was a warrantless arrest, when in fact the Police Department had a duty to disclose this document at the Discovery Conference? ***See APP.3.***

B. Does the trial court abuses its discretion if it "base[s] its ruling on a clearly erroneous assessment of the evidence, whereas in its 'MEMORANDUM' ***SEE*** **APP.2** , the 9th Circuit panel asserts that there were charges filed by the District Attorney, when in fact there were no charges filed and in fact the District Attorney sent letters to Detective Ball and the Las Vegas Metropolitan Police Department **denying** their request for an arrest on three separate occasions? ***SEE*** **attached APP. 65,66,67. 'Notice of Denials'** ***SEE attached APP. 8 , U.S. District Court Order Granting Summary Judgment regarding Qualified Immunity SEE LAST SENTENCE.*** **See APP.34,U.S. District Court Order Entered and Served June 10, 1999 Granting Summary Judgment regarding Official Capacity at LAST PARAGRAPH**

C. Was John Geremia's Constitutional rights violated when he was arrested by warrants issued by Justice of the Peace Billy Moma on three separate occasions, when these warrants were not supported by 'sworn affidavits of statements'?

D. Did the lower court error when it dismissed this case by Summary Judgment prior to John Geremia being able to depose the Co-Defendants William and Joann Tullos, because William and Joann failed to cooperate and set for a deposition? ***SEE*** **APP.68,69, Letters from Tullos. See footnotes page 19 District Court order APP.29 1ST.PARAGRAPH.**

E. Did the lower court error when it dismissed knowing that Las Vegas Metropolitan Police Department had failed to provide exculpatory evidence in regards to admissions by Joann, Kiesha, and Crystal Tullos at trial that they had provided the police with statements, yet these statements were never provided at trial or during civil discovery? ***SEE*** **in pertinent part trial transcripts of alleged victims admitting to providing statements to police that have never been provided to Plaintiff. APP.70,71 (Mrs.Joann Tullos), APP.72 THROUGH 76, (Kieshia Tullos as well as important statements by Potter attorney for Plaintiff John Geremia at the time) (Krystal Tullos APP.77 THROUGH 80. These trial transcript are part of the record and in the possession of the 9th Circuit.**

F. Did the 9th Circuit panel abuse its discretion when in it's 'MEMORANDUM' it states the district court did not abuse its descretion by denying Geremia's motion to compel discovery because Geremia's allegation that defendants withheld a portion of Joann Tullos' July 1995 statement lacked factual support? ***SEE*** **APP.81,*affirmation* of an obvious statement,*SEE* APP. 61 U.S. District Court Order Entered and Served May 21, 1999,** yet the statement was never provided!

PARTIES TO THE PROCEEDING

Including the parties named in the caption of this Petition, The parties are:

Petitioner: John Geremia

Respondents: Las Vegas Metropolitan Police Department, Detective T. Ball, William Tullos, Joann Tullos, and William Moma.

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OPINION BELOW

On September 9, 2002 and filed September 16. 2002 the 9th Circuit Court of Appeals entered an opinion affirming the lower courts orders dismissing this case by Summary Judgment. **A copy of the opinion (memorandum) is attached as APP.1.** A request for review 'En Banc' was later denied and filed March 4, 2003. attached as **APP.4.**

U.S. District Court orders and opinions **APP.5 AND APP.31.**

JURISDICTION

Jurisdiction of this Court is invoked under Title 28, United States Code 1254(2)

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Plaintiff asserts his First, Fourth, Fifth, Eighth and Fourteenth Amendment constitutional rights were violated. Plaintiff also maintains claims for false arrest, false imprisonment, malicious prosecution, intentional infliction of emotional distress and negligent infliction of emotional distress all under the laws of the State of Nevada.

STATUTES

42 U.S.C.A. subsection 1983.. **7-9**

RULES

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STATEMENT OF THE CASE

Simply stated, this is a case where the police where denied a request for arrest by the Clark County District Attorney on three separate occasions, so failing this attempt, they obtained warrants from Justice of the Peace Billy Moma (a retired 28 year policeman). None of these warrants were supported by a sworn affidavit, or any sworn statement of any kind. No sworn statements have every been provided during criminal proceedings or civil discovery of this matter. ***SEE 'District Attorney Denial of Request letters'*** **attached hereto APP. 65,66,67,**

Furthermore, Plaintiffs right to due process was further violated when the Police Department provided a one page statement from Joann Tullos, which is most obviously an affirmation of a statement, which preceded this page ***See*** **attached hereto APP. 81**. John Geremia has never received any sworn statement of facts that led up to the arrests by warrant on three occasions.

At the criminal trial the alleged victims Joann, Kiesha, and Crystal admitted to providing the Police with sworn statements, yet these statements have never been provided. All the foregoing is clearly the hiding of 'exculpatory evidence'. ***SEE*** **attached hereto pertinent portions of trial transcripts, APP. 70 THROUGH 80.**

During the discovery of this matter plaintiff John Geremia, attempted to depose William and Joann Tullos, but they failed to show up. Discovery was reopened for the express purpose of taking the depositions. Two more times the Tullos Co-defendants failed to co-operate with plaintiff's attempt to depose them. ***SEE* attached hereto 2 letters from Joann and William refusing to set for the depositions. Attached as APP. 68,69. See footnotes page 19 District Court order APP.29 1ST.PARAGRAPH.**

Most importantly all of the defendants' pleadings in regards to their motions for summary judgment surrounded the theory that somehow there was a 'warrantless arrest'. **The defendant Police Department did not produce the 'Declaration of Arrest' dated 9-12-95 so that they could argue that there was a warrantless arrest, and deceive the court.** ***See* APP. 64.** Geremia attempted to provide the document in Plaintiffs' Reply brief and the 9th Circuit refused to consider it. ***See* last paragraph of '9th Circuit Memorandum' APP.3.** Yet after Plaintiff provided copies of the warrants from Justice Court it was surprising to have the 9th Circuit deny Plaintiff appeal on the grounds that the District Attorney filed charges thereby giving 'qualified immunity' to the police. **When in fact all the documented evidence is to the contrary. The District Attorney always refused the Police Departments request for arrest, three times in fact.**

STATEMENT OF THE LAW

In regards to question **A** the Police Department violated FRCP 26 by not producing the first Declaration of Arrest. They further made an attempt to mislead the court into believing there was a warrantless arrest. The pro se Plaintiff in accordance with FRCP 37 (1993 Ammendment) Subdivision (c). 'due to lack of knowledge of a pro se litigant' attempted to uncover this deception and chicanery by submitting this document which was unintentionally omitted by a pro se litigant but, intentionally omitted by defense counsel. Accordingly justice would be best served if the Supreme Court allowed this 'Declaration of Arrest' to be considered and sanctions should be automatically imposed against the Defendant Police Department pursuant to FRCP 37 (1993 Amendment) (c). ***See* APP 64.** This is not a harmless error as defined in FRCP 61.

In regards to question **B**, where 9th Circuit assert that the District Attorney filed arrest warrants, when in fact ,the documented evidence supported the fact that the District Attorney refused to issue arrest warrants. The trial court abuses its discretion if it "base[s] its ruling on an erroneous view of the law or on a clearly erroneous assessment of the evidence." Id. (quoting **Cooter & Gell v. Hartmarx Corp**., 496 U.S. 384, 405 (1990)).

***SEE* APP. 65,66,67. letters from District Attorney denying request. *SEE APP. 8, LAST SENTENCE, U.S. District Court Order Granting Summary Judgment regarding Qualified Immunity* . See APP.34 LAST PARAGRAPH,U.S. District Court Order Entered and Served June 10, 1999 Granting Summary Judgment regarding Official Capacity.**

Most importantly in the 9th Circuit panel's memorandum they assert that there was qualified immunity because the district attorney acted independently in the filing of charges. **Smiddy v Varney,** 665 F.2d 261, 267 (9th Cir. 1981). There is overwhelming evidence that in fact each and every time the police requested a warrant for arrest from the Clark County District Attorney it was denied due to insufficient evidence or a lack of prosecutorial merit. **The District Attorney never filed a criminal complaint**. All the complaints were filed by Laughlin Justice Court and signed by Judge Moma of that court after denial by the District Attorney. There are no complaints generated by the DA's office, in fact the DA continued to recommend not to issue a warrant. All the records and exhibits bare this out. **The 9th Circuit and U.S District Court presumes that the District Attorney issued arrest warrants with no material evidence to support this presumption. There is no evidence whatsoever that the District Attorney approved the case for prosecution. In fact the evidence is contrary, the District Attorney continued to recommend NOT TO PROSECUTE.**

Simply stated, the police were denied a warrant by the DA so they solicited one from Judge Moma (a 28 year retired police officer that worked with Detective Ball for many years).

Regarding question **C**, The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, ***and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation*****.....**in pertinent part, emphasis added. **Amendment VII, Article IV United States Constitution.**

Regarding question **D,** the plaintiff John Geremia was denied his right to discovery and due process by the premature dismissal by Summary Judgment before he was able to secure deposition testimony of Co-defendants Joann and William Tullos. ***See*** **APP.68,69.** As this panel knows, Pro se complaints, according to the Supreme Court, are held "to less stringent standards than formal pleading by lawyers," and regardless of who represents the plaintiff, a motion to dismiss, or summary judgment is not to be granted unless it appears beyond doubt that the plaintiff can prove no set of acts which would entitle him to relief. **Haines v. Kerner,** 1972, 404 U.S. 519, 30 L. Ed. 2d 652, 92 S.Ct 594, 496, Reh. Den., 405 U.S. 948, 30 L.Ed. 2d 918, 92 S.Ct. 963. The Court's granting of the defendant's motion for summary judgment before adequate discovery could be had was inappropriate. The plaintiff is entitled to present the best arguments it can in opposition to the defendant's motion for summary judgment. Therefore, a plaintiff must have access to information that could support his allegations, which would come from adequate discovery. When Affidavits Are Unavailable, the
Court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just. In ruling on a motion to dismiss or for summary judgment based on the timeliness of an action a court must construe the pleadings, affidavits, and record in the light most favorable to plaintiff. **OFCCP v. CSX Transportation, Inc.,** 88-OFC-24. Because the plaintiff should also have the opportunity to make specific arguments in support of its opposition to a defendant's summary judgment motion,

Plaintiff had a right to discovery before responding to defendant's motion for summary judgment. To determine whether there is a genuine issue of material fact and whether the defendants are entitled to a judgment as a matter of law, the court should rely on the pleadings, depositions, answers to interrogatories, and admissions (in other words adequate discovery). None of which has been afforded Plaintiff to this point, as evidenced by the fact that Plaintiff has also had to file a Motion to Compel such discovery.

In regards to question **E** and the hiding of exculpatory evidence, it is clear that statements of alleged victims where never provided, even though the victims under sworn testimony admitted to providing these statements ***(SEE* pertinent portions of trial testimony APP.70 THROUGH 80)** to the police and in fact one '**affirmation**' of a statement of Joann Tullos was evidenced in defendants 'excerpts of record'. ***See*** Joann Tullos one page affirmation **SEE APP. 81.** These actions by Detective Ball and the Police Department rise to the level of deliberate indifference or reckless intent, which prevents Qualified Immunity protection. **Romero v. Stover** 45 F. 3d 1472, 1478 (10 Cir. 1995)

Police officer cannot avail himself of qualified immunity defense in subsection 1983 action if he procures false identification by unlawful means or **deliberately conceals exculpatory evidence,** for such activity violates clearly established constitutional principles, 42 U.S.C.A. subsection 1983. **Geter v. Fortenberry** 849 F. 2d 1550(5th Cir. 1988)

Although police are not required to keep written records of all their investigatory activities, attempts to circumvent that by retaining records in clandestine files deliberately concealed from prosecutors and defense counsel, which contain exculpatory evidence, cannot be tolerated. City police department's maintenance of 'street file' written records of police officers, investigatory activities which were not provided to either prosecutors or defense counsel, even though they contained exculpatory evidence was sufficient custom to impose civil liability on city following civil rights plaintiff's previous arrest, false imprisonment, and further attempts of police officers to "railroad" him to prison, even in fact of decisive exculpatory evidence, where custody to maintain was department wide and of long standing. Decision by prosecutor to charge criminal defendant now civil plaintiff, did not break chain of causation between conduct and defendant, police officers' falsification of reports to prosecutor and hiding exculpatory evidence in street files were legal cause of Plaintiff's false imprisonment and arrest. **Jones v. City of Chicago,** 856 F. 2d 985 (7th Cir. 1988)

As the documented evidence points out because Detective Ball and the Police Department after failing to obtain charges from the District Attorney they received them from Justice of the Peace, Laughlin Township, Billy Moma, this does not mean they are immune because Moma issued the warrant.

In this matter, Detective Ball asserts that he simply provided the information to the District Attorney and Judge Moma. this is not a defense as it has been indicated,"...if no police officer of reasonable competence would have requested the warrant, i.e., his request is outside range of professional competence expected of a police officer, and magistrate issues warrant in such a case, his action is not just a reasonable mistake, but an unacceptable error indicating gross incompetence or neglect of duty; officer then cannot excuse his own default by pointing to greater incompetence of magistrate. 42 U.S.C.A. subsection 1983, **Malllery v Briggs,** 106 S.Ct. 1092 (1986). Such is the case in this matter. Request for warrants were submitted yet to this day no supporting affidavits were submitted or shown to exist!

The question this court must answer is: Was Thomas Ball's Declaration of Warrant justified if it was not supported by any statements sworn or otherwise? It is well established that, in an action for unlawful arrest pursuant to a facially valid warrant, a police officer is entitled to qualified immunity unless "no officer of reasonable competence would have requested the warrant." **Mallery** 475 U.S. 345, 346.

The plaintiff John Geremia submits that because warrants were obtained at the court house next to the Laughlin Police station and to this day no supporting affidavits supporting these warrants have ever been produced, it is clear that there are genuine issues of material fact regarding whether Ball and the Department (!) possessed the requisite culpability, and (2) caused the constitutional violation directly enough to incur 1983 liability.

In **Lewis** 523 U.S. 846, the Supreme Court distinguished the different criteria used to establish 1983. It is clear that there were specific indifferent, intentional acts by Detective Ball and the Police Department that violated Plaintiff John Geremia's constitutional rights.

The 9th Circuit in it's 'Memorandum' states in pertinent part....

The district court did not abuse its discretion by denying Geremia's motion to compel discovery because Geremia's allegation that defendants withheld a portion of Joann Tullos' July 1995 statement lacked factual support, respectfully borders on ludicrous. Clearly any reasonable persons reading the 'one page' that bears Joann Tullos signature can see that their was obviously a presiding statement of facts. See 'memorandum' second to last paragraph.

How is the plaintiff to know what contentions were improperly raised for the first time in Geremia's Reply Brief if the panel does not name them? See 'memorandum' last paragraph.

REASONS FOR GRANTING THE WRIT

The party moving for summary judgment has the initial burden of showing the absence of a genuine issue of material fact. **Zoslaw v.MCA Distrib. Corp.,** 693 F.2d 870, 883 (9th Cir. 1982). Given the fact that the Joann Tullos 'one page' exhibit clearly is favorable to the fact that pages presided it, and to the fact that their have been no sworn affidavits presented that would support a warrant for plaintiff John Geremia(on three separate occasions) provided by the defendant, this Supreme Court must conclude that John Geremia Constitutional rights were violated when he was arrested by warrant obtained without the prerequisite of securing sworn statements supporting the three arrest warrants.

Furthermore, John Geremia's right to discovery in regards to Joann and William Tullos must be restored. This court cannot condone a co-defendant refusing to cooperate with discovery while another co-defendant moves for summary judgment. Nor can this court rule out the fact that Tullos depositions would have uncovered facts. This hiding of facts cannot be tolerated.

reproduced in form and content here:

SWORN STATEMENT

Under the penalties of perjury, I swear or affirm that the information is true and that the applicant is in need of the requested Protective Order

_____

Applicant

SIGNED AND SWORN TO OR AFFIRMED

Given the fact that witnesses under sworn trial testimony admitted to giving the Police Department statements the Department has not produced these signed statements obtained prior to that trial. .....These actions by Detective Ball and the Police Department rise to the level of deliberate indifference or reckless intent, which prevents Qualified Immunity protection. **Romero v. Stover** 45 F. 3d 1472, 1478 (10 Cir. 1995)

Most importantly, there should be a self-executing sanction imposed against the Defendant Police Department for omitting the first 'Declaration of Arrest' so that they might try and deceive the court into believing their extensive arguments regarding 'warrantless arrest'.

CONCLUSION

This case must be remanded as a matter of course, AND THIS WRIT GRANTED.

1. No sworn statements supporting three warrants is a material fact favorable to a trial. These warrants were obtained from Laughlin Justice Court after the District Attorney refused to file charges.

2. A document lacking in facts(in regards to Joann Tullos Sworn Statement), yet swearing to facts, clearly indicates the hiding of evidence, which is favorable to plaintiff receiving a trial of this matter.

3. The 9th Circuit abused it's discretion when applying case law in the 'memorandum '. specifically **Smiddy v. Varney** , 665 F 2d 261, 267 (9th Cir. 1981) must be distinguished from Plaintiff John Geremia's case as unlike in **Smiddy** Geremia's warrants were never caused by the filing of charges from a District Attorney.

4. Witnesses for the Police Department give sworn testimony that they gave statements to the police, yet these statements are not forthcoming. This behavior cannot be tolerated and demands this case be set for trial.

5. Plaintiff John Geremia , was denied discovery in regards to Co-defendants Joann and William Tullos refusing to set for a deposition. These are the Police Department's alleged victims.

In pertinent part Federal rules of Civil Procedure 56 1963 Amendment last sentence.....

And summary judgment may be inappropriate where the party opposing it shows under subdivision (f) that he cannot at the time present facts essential to justify his opposition.

6. The 9th Circuit in its 'memorandum' last sentence, states they have not considered contentions improperly raised. **The 9th Circuit should be more concerned that the defendant Las Vegas Police Department did not produce the first 'Declaration of Arrest' dated 9-12-95 in violation of FRCP 26. Rather the defendant tried to mislead the court in believing that there was a 'warrantless arrest', in fact their whole argument surround case law involving warrantless arrest.** John Geremia a pro se litigant realizing the significance of this deception produced this document with his reply. Pursuant to FRCP 61 and FRCP 26 (1993 Amendment) (c), the 9th Circuit cannot ignore this document because it was untimely, as this would be inconsistent with substantial justice. **The 9th Circuit should have been more concerned as to why the Police chose not to produce this 'Declaration of Arrest' at the Discovery Conference and chose to base their argument on warrantless arrest!** They attempted to mislead the court and a pro se litigant. Justice, FRCP 26(c) and FRCP 37 requires that this document be considered and sanctions imposed against the Defendant Las Vegas Metropolitan Police Department.

John Geremia

John Geremia / Plaintiff-Appellant in Proper Person

APP.1

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JOHN DAVID GEREMIA,	) No. 00-15023
	) DC NO. CV-
Plaintiff-Appellant;	) 97-01166-DWH
	) **MEMORANDUM**
v.	)
	)
LAS VEGAS METROPOLITAN	) **FILED**
POLICE DEPARTMENT, et al.,	) SEPT. 16, 2002
	)
Defendants_Appellee	)
	)

Appeal from the United States District Court
For the District of Nevada
David Warner Hagen, District Judge. Presiding
Submitted September 9, 2002

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

** the panel unanimously finds this case suitable for decision without oral argument and denies Geremia's request for oral argument. See Fed. R. App. P. 34(a)(2).

Before: HUG, O'SCANNLAIN, TASHIMA, Circuit Judges.

John David Geremia app[eals pro se the summary

judgment in favor of Las Vegas Metropolitan Police Department and Detective Ball, and the orders denying Geremia's motions for reconsideration. We have jurisdiction under 28 U.S.C. 1291, and we affirm.

We review summary judgment de novo, and denial of reconsideration for an abuse of discretion. *Hayes v. Palm Seedlings Partners-A, (In re Agricultural Research & Tech. Group, Inc.). 916 F.2d 528, 533 (9th Cir. 1990).* The district court properly granted summary judgment to the Las Vegas Metropolitan Police Department and to Detective Ball in his official capacity because Geremia failed to demonstrate the existence of a genuine issue of material fact with respect to his claims that the municipality had policies which led to improper arrests and inadequately trained its police officers in arrest procedures. See *Butler v. Elle,* 281 F.3d 1041-42 (9th Cir. 2000). Similarly, the district court properly granted summary judgment to Detective Ball in his individual capacity because Geremia failed to set forth evidence to support his allegation that Detective ball caused a cognizable constitutional injury. See *Saucier v. Katz,* 533 U.S. 194, 201 (2001) (stating that Threshold question for qualified immunity analsis is whether officer's conduct violated a constitutional right); *Smiddy v. Varney,* 665 F.2d 261, 267 (9th Cir. 1981) (holding that police officers are not liable for damages under 42 U.S.C. 1983 where district attorney made decision to file charges and there is no evidence to rebut presumption that district attorney acted independently).

The district court did not abuse its discretion by denying Geremia's motions for reconsideration because Geremia failed to present adequate grounds for relief. See *Sch. Dist. No. IJ, Multnomah County v. Acands, Inc.,* 5 F.3d 1255, 1263 (9th Cir. 1993).

The district court did not abuse its discretion by

denying Geremia's motion to compel discovery because Geremia's allegation that defendants withheld a portion of Joann tullos' July 1995 statement lacked factual support. See *Hallett v. Morgan,* 287 F. 3d 1193, 1212 (9th Cir. 2002).

The remaining contentions raised in the opening brief lack merit. We have not considered contentions improperly raised for the first time in Geremia's Reply Brief. See *Eberle v. City of Anaheim,* 901 F. 2d 814, 818 (9th Cir. 1990).

AFFIRMED.

APP. 4

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JOHN DAVID GEREMIA,	) No. 00-15023
	) DC NO. CV-
Plaintiff-Appellant,	) 97-01166-DWH
V	) Nevada
	) Las Vegas
LAS VEGAS METROPOLITAN	)
POLICE DEPARTMENT, et al.,	) **ORDER**
	) **FILED**
Defendants-Appellees.	) MARCH 4, 2003

Before: Hug, O'Scannlain, and Tashima, Circuit Judges

Judges O'Scannlain and Tashima vote to deny the petition for rehearing en banc, and Judge Hug so recommends.

The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. See Fed. R. App. P. 35.

The petition for rehearing en banc is denied.

No further filings shall be accepted in this closed appeal.

App. 5

United States District Court ,District Of Nevada

Order Entered and Served June 30, 1999. CV-S-01166-DWH

Before the court is defendant Detective Thomas Ball's Motion (#56) for Summary Judgment regarding Qualified Immunity. Plaintiff has opposed (#58) and defendant has replied (#64) For the reasons stated below, the court grants defendant's motion.

Introduction

Plaintiff has instituted a civil rights action against defendants Las Vegas Metropolitan Police Department ("LVMPD"), Detective Thomas Ball, William and Joann Tullos, and Justice court Judge William Moma. In his complaint, plaintiff asserts his constitutional rights were violated during the course of a police investigation, arrest, and prosecution by the Clark County District Attorney's Office. Plaintiff claims his First, fourth, Fifth, Eighth and fourteenth constitutional rights were violated. Plaintiff also maintains claims for false arrest, false imprisonment, malicious prosecution, intentional infliction of emotional distress and negligent infliction of emotional distress all under the laws of the State of Nevada.

1 In his Opposition, plaintiff revisit's the issue of Punitive Damages. The court, however has already ruled on this issue and will not address it any further unless the court receives a proper motion for reconsideration, See Order (#76).

APP.6

Factual Background

This lawsuit stems from citizens' complaints and statements submitted to the LVMPD, Laughlin substation, in early July of 1995.*2 See* Defendant's Motion (#56) at 2-3. These complaints and statements described plaintiff's behavior on Numerous occasions where he allegedly intimidated defendants William and Joann tullos, their two daughters, and some of the Tulloses' guest. *3*

Defendant Thomas Ball is a detective with the LVMPD. In the course of his duties as a detective, defendant Ball received the above complaints and statements pertaining to plaintiff. Detective ball also received a sworn statement by defendant Joann Tullos*4* and a copy of a Protective Order requiring plaintiff Geremia to "refrain from contacting, intimidating, threatening or otherwise interfering with"the family.*5 Id, Ex. H.*

2 Plaintiff contends these complaints and statements were neither voluntary nor genuine. *See* Plaintiff's Motion (#58)at 1. This court, however rejects plaintiff's argument since he has not provided and evidence to support this theory. By simply labeling witnesses as convicted child molesters and convicted felons without any further evidentiary support, plaintiff does not inject any credibility into his argument. The use of unsubstantiated allegations does not raise a genuine issue of material fact.

3*See* e.g., Defendant's Motion (#56), Ex. A(Sheila Patton's Witness Statement): Ex. B(Joey Bombara, III's Statement); Ex. C (William Tullos's Statement); Ex. D (a handwritten letter from Thomas Patton to the Monte Del Sol Homeowners Association); Ex. E (a ty ped version of exhibit D with a carbon copy to LVMPD); Ex. F (a typed letter from Shiela Patton to persons unknown); Ex. G (an incident report given to LVMPD by Joanne Tullos and her two minor daughters, Keisha Tullos and Krystal Tullos).

4 The sworn statement of defendant Joann Tullos was one page in length, dated July 5, 1995. *See* Order (#74); Defendant's Motion (#56), Ex. J.

5 The Protective Order was dated July 5, 1995 and signed by defendant Justice Court Judge William Moma of the Clark County Justice Court. In conjunction with the protective order, Detective Ball also received "instructions to the Sheriff" dated July 5, 1995.

Upon receipt of the information, Detective Ball packaged the above referenced materials and on July 17, 1995, prepared a Declaration in Support of a Warrant/Summons for plaintiff's alleged activities. The file was then submitted to the Clark county district Attorney's office for further review.

On or about July 26, 1995, Detective Ball received a notice from the District Attorney's office that the package he submitted with the Declaration in Support of a Warrnat/Summons was denied for prosecution. Id., Ex. K. the document itself indicated that the denial was premised upon "insufficient evidence." Id. However, the Deputy District attorney, Karen Van De Pol, also indicated that the matter could be resubmitted, if the plaintiff, John Geremia, violated the protective order. Id. Nevertheless, on July 28, 1995, the case was cleared by Detective Ball and closed out with no further action. Id., Ex. Z.

Unbeknownst to Detective Ball, the Clark County District Attorney's office thereafter filed a criminal charge against plaintiff Geremia for misdemeanor stalking and an arrest warrant was submitted to defendant Justice court Judge William Moma. Id., Ex. W at 51. The warrant was signed by Judge Moma and plaintiff Geremia was arrested on September 12, 1995

On September 15, 1995, plaintiff Geremia pled not guilty to the charges. Id., Ex. L. He was tried on November 30, 1995 and convicted of the misdemeanor charge of stalking. The

conviction was later overturned on appeal and the matter, which was reset for trial on multiple occasions, was eventually dismissed by the District Attorney's office on its own motion.

Meanwhile, prior to the dismissal of the misdemeanor action, the Tulloses submitted additional reports the the LVMPD regarding plaintiff's alleged violations of the protective order. *6* In support of their complaints, Keshia Tullos submitted a voluntary statement to the LVMPD on Juanuary 31, 1996, and then, on February 5, 1996, defendant William Tullos submitted a voluntary

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6 On at least two occasions, plaintiff allegedly followed Keshia Tullos, making "rude remarks and scary noises" which caused Keshia to become scared and to run home. Plaintiff also allegedly looked through the Tulloses' bathroom window with binoculars while Mrs. Tullos was in the bathroom. Plaintiff allegedly flipped the "bird" at the Tulloses and swore at them. Plaintiff is also alleged to have stopped friends of Keshia Tullos, yelling profanities at them, as they left the Tulloses' home.

Statement to the LVMPD as well.*7* Id., Ex. M. Moreover, on February 6, 1996, the Tulloses filed an incident reprt with the LVMPD at the Laughlin substation, Id., Ex. N.

Once again, Detective Ball put all the materials together and submitted them to the Clark County District Attorney's office. The District Attorney's office, however, requested a certified copy of the protective order before considering going forward with the case. Id., Ex. O. In the meantime, Detective Ball also received two witness statements from Mark Fester, both dated February 11, 1995, regarding plaintiff's conduct near the Tulloses' home. Id., Ex. AA. On March 14, 1996, 1996, the District Attorney"s office had already decided to pursue the case without defendant Ball's knowledge and submitted a Warrant of Arrest to defendant Justice court Judge Moma for his approval. Judge Moma

signed the arrest warrant and plaintiff Geremia was arrested that same day. Plaintiff was then transported to the detention facility in Laughlin, Nevada. ID. Ex. P. Prior to the submission of the arrest warrant, a criminal complaint was also filed by the District Attorney's office. Id., Ex. Q. However, this matter would eventually be dismissed with prejudice on February 27, 1997.*8*

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7 Plaintiff claims the statement from defendant William Tullos was the only statement relating to the issue of stalking and the statement was hearsay. *See* Plaintiff's Motion(#58) at 1-2. The court rejects plaintiff's claim for being against the weight of the evidence. Individuals, other than William Tullos, have filed statements concerning plaintiff's alleged stalking. *See*, e.g., Defendant's Motion (#56), Ex. M (Statement by Keshia Tullos).

8 Plaintiff contends the Justice Court, not the district Attorney's office, repeatedly sought his arrest, despite the District Attorney's office's determination that there was no prosecutorial merit in the matters. *See* Plaintiff's Opposition (#58) at 2. Plaintiff argues, of the numerous alleged charges, only one had a criminal arrest warrant filed by the District Attorney's office and this was dismissed with prejudice. Id. The other two charges, plaintiff claims, were initiated by warrant and/or summons placed in front of Justice Court Judge Moma by Detective Ball. Id.

Once again, the court rejects plaintiff's arguments as being against the weight of the evidence. Plaintiff is alleging that Justice Court Judge Moma and Detective Ball were the driving forces behind the arrests, not the Clark county district Attorney's office. However, in each of the aforementioned matters that went to criminal complaints, Detective Ball simply submitted the matters to the District Attorney's office and it was their decision whether or not to prosecute. *See* Defendant's Motion (#56). Ex. W at 50, 71 (Defendant Ball was unaware the matters went to criminal complaints). For example, two of the three submissions by

Detective Ball were denied by the District Attorney's office for the various reasons referenced above. It was only therafter that the District Attorney's office decided to seek arrest warrants rather than summons and it was the District

In or about April 1996, plaintiff Geremia had a further incident with coaches of a local kids' team of which his daughter was a member. As a result of the confrontations with the coaches, complaints were made to the LVMPD and statements were provided. More specified ally, sworn statements were given at the police station by Trudy May Spencer, William Louis Schuite, Ronda Hibdon, Beverly Freitas, Lisa Hackney, Marie Ellen Hartley, Michelle Anthony, and Theresa Lynn Gregg. Id., Ex. R. In addition, Ms. Freitas and Ms. Hackney both filed complaints against plaintiff Geremia for harassment. Id, Exs. S&T; see also Id. Ex. U (an incident report taken May 14, 1996, listing the victims as Beverly Freitas and Lisa Hackney).

Once again, Detective Ball packaged the materials together and submitted them to the district Attorney's office for further review. Id., EX. W. Included in this submission was a copy of an Order for Protection issued by the Justice Court on May 14, 1996 to Beverly Freitas and Lisa Hackney against plaintiff Geremia. Id., Ex. V. however, on May 24, 1996, the District Attorney's office denied the prosecution stating it "lack[ed] prosecutorial merit." Id., Ex. Y. Deective Ball then closed out his file on July 17, 1996. Id., Ex. AC.

Despite the communications between Detective Ball and the Clark County District Attorney's office the District Attorney's office thereafter brought a charge of disorderly conduct against plaintiff Geremia without defendant Ball's knowledge. *See* Defendant's Motion (#56) at 18.

A. **Motion for Summary Judgment**

Summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." *Fed. R. Civ. P. 56(c).* The burden of demonstrating the absence of a genuine issue of material

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Attorney's office who prepared and signed the criminal complaints, not Detective Ball or Justice Court Judge Moma. Id., Ex. W at 48, 66, 73. The evidence also reveals Detective Ball was not aware of the District Attorney's office's intentions to prosecute plaintiff Geremia and in some instances he only learned of the prosecution when the warrants were served upon plaintiff and/or he was confronted by plaintiff's wife Lynn Geremia, at the Laughlin substation. Id. At 48, 66, 71, 73.

Similarly, Justice Court Judge Moma's role was to sit as an objective judicial body, not as a vindictive, zealous prosecutor as plaintiff alleges. That is simply not the case and the evidence does not support such a theory at this time.

Fact lies with the moving party, *Zoslaw v. MCA Distr. Corp. 693 F. 2d 870, 883 (9th Cir.).cert. Denied, 460* U.S. 1085(1983), and for this purpose, the material lodged by the moving party must be viewed in a light most favorable to the nonmoving party. *Adickes v. S.H. Kress & Co.,* 398 U.S. 144, 157 (1970); *Baker v. Centenial Ins. Co.,* 970 F. 2d 660,662 (9th Cir. 1992). A material issue of fact is one that affects the outcome of the litigation and requires a trial to resolve the differing versions of the truth. *S.E.C. v. Seaboard Corp.* , 677 F. 2d 1301, 1306 (9th Cir. 1982).

Once the moving party presents evidence that would call for judgment as a matter of law at trial if left uncontroversial, the repondent must show by specifid facts

the existence of a genuine issue for trial. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 259 (1986).

> [T]here is no genuine issue of fact for trial unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party. If the evidence is Merely colorable, or is not significantly probative, Summary judgment may be granted.

Id. At 249-50 (citations omitted). 'a mere scintilla of evidence will not do, for a jury is permitted to draw only those inferences of which the evidence is reasonably susceptible; it may not resort to speculation." *British Airways Board v. Boeing Co.*, 585 F. 2d 946, 952 (9th Cir.), cert. Denied, 440 U.S. 981 (1979); see *Hahn v. Sargent*, 523 F. 2d 461, 467 (9th Cir. 1975) (a non-moving party 'is not entitled to build a case on the gossamer threads of whimsy, speculation, and conjecture."); *Richards v. Nielson Freightlines*, 602 F. Supp. 1224, 1231 (E.D. Cal. 1985), *aff'd*, 810 F.2d 898 (9th Cir. 1987) (mere allegations or denials, unsubstantiated hope, and threadbare conclusory statements are all insufficient once the moving defendant has met its initial burden). Moreover, if the factual context makes the nonmoving party's claim implausible, that party must come forward with more persuasive evidence that otherwise would be necessary to show there is a genuine issue for trial. *Matsushita Elec. Indus. Co., LTD. V. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986); *California Architectural Bldg. Products v. Franciscan Ceramics, Inc.*, 818 F.2d 1466, 1468 (9th Cir.), cert. Denied, 484 U.S. 1006 (1988).

If the party seeking summary judgment meets its burden, then summary judgment will be granted unless there is significant probative evidence tending to support the opponent's legal theory. *First National Bank of Ariz. V. Cities Serv. Co. 391 U.S. 253, 290 (1968); Commodity Futures*

Trading Commision v. Savage, 611 F. 2d 270, 282 (9th Cir. 1979).

In the instant case, defendant Detective Ball brings this motion for summary judgment relying on the doctrine of Qualified Immunity. Defendant contends he is entitled to such immunity because the Ninth Circuit's three part test to invoke the doctrine is satisfied. More specifically, defendant Ball asserts there was probable cause for each case he referred to the Clark County District Attorney's office that concerned plaintiff Geremia. In addition, defendant also argues that plaintiff's malicious prosecution claim fails on the merits. In sum, defendant Ball claims summary judgment is warranted in his favor, especiallly in light of all the supporting evidence and exhibits attached to his motion and the non-existence of any genuine issues of material fact.

On the other hand, plaintiff contends defendant Ball is not entitled to qualified immunity as "[t]here is a chain of conduct by the defendants which plaintiff believes rises to he level of conspiracy, perjury.....violations of [j]judicial conduct, coercion of statements and witnesses by LVMPD, and encouragement or solicitation of statements from known felons and child molesters to make an unwarranted case." Plaintiff's Motion (#58) at 5. As a result, plaintiff believes that genuine issues of material fact exist and defendant's motion should be denied. Id. At 10 ('there are many issues of material fact that need to be decided by a jury"

As will be demonstrated below, the court finds no genuine issues of material fact exist, and at the same time, grants defendant's motion.\

B. Qualified Immunity

The doctrine of qualified immunity was developed to protect government employees from lawsuits and individual liability in the discharge of their public duties. *9 See Cerrato*

v. San Francisco Community College Dist., 26 f. 3d 968, 973 (9th Cir. 1994)("Personal-capacity suits seeks to impose personal liability upon a government official for actions he takes under color of state law.") Thus, this immunity provides government officers with an additional layer of protection

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9 Qualified Immunitty was designed as a compromise "struck across the board because of the 'substantial social costs, including the risk that fear of personal monetary liability and harassing will unduly inhibit officials in the discharge of their duties." *Anderson v. Creighton,* 483 U.S. 635, 638 (quoting *Harlow v. Fitzgerald,* 457 U.S. 800 (1982).

Against civil liability. See *Anderson v. Creighton*, 483 U.S. 635 (1987). However, qualified immunity is only available to government officials who could reasonably have believed their acts were lawful in light of clearly established law and the information they possessed. See *Kennedy v. Los Angeles Police Dept.*, 901 F. 2d 702, 706 (9th Cir.) *rev'd on other grounds,* 988 F. 2d 868 (9th 1993) therefore, officials will be immune unless "the law clearly proscribed the actions" which they performed. *Mitchell v. Forsyth,* 472 U. S. 511, 528 (1985).

The Ninth Circuit has developed a three-part test to determine if a government official is entitled to qualified immunity. In *Romero v. Kitsap County*, 931 F. 2d 624, 627 (9th Cir. 1991), the Ninth Circuit held the qualified immunity test necessitates three inquiries:

> (1) the identification of the specific right allegedly violated;(2) the determination of whether that right so "clearly established" as to alert a reasonable officer of his

> Constitutional parameters; and (3) the ultimate determination of whether a reasonable officer could have believed lawful the particular conduct at issue.

Accord *Jensen v. City of Oxnard,* 145 F. 3d 1078, 1085 (9th Cir. 1998); see *Hunter v Bryant,* 502 U.S. 224, 229 (1991)(quoting *Mallery v. Briggs*, 475 U.S. 335, 344-45 (1986)(this test allows ample room for reasonable error on the part of the police officer; it protects "all but the plainly incompetent or those who knowingly violate the law.") In addition, the Ninth Circuit has also held this test is wholly objective in nature and does not depend on the defendant's subjective intent. See *Kirkpatrick v. City of Los Angelos,* 803 F.2d 485, 490 (9th Cir. 1986).

Applying this test to the instant case; the court finds defendant Ball in entitled to qualified immunity. As will be demonstrated below, each element is satisfied in Detective Ball's favor.

1. First Element

The first prong of the qualified immunity test requires the specific right allegedly violated to be identified. For the purposes of this motion, plaintiff attempts to identify two rights which he claims were allegedly violated.*10* Although plaintiff's arguments are unclear, it appears he is arguing his Fourth Amendment right against unreasonable seizures was violated and in addition, hee is asserting his right to a full police investigation was not observed.

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10 Plaintiff makes other allegations against defendant Ball's co-defendants, namely Justice Court Judge Moma, yet these allegations are not relevant to the issue of qualified Immunity.

Upon review of these claims, the court finds plaintiff has sufficiently pled an alleged Fourth Amendment violation. However, as demonstrated in the next stage of the court's analysis, plaintiff's "failure to fully investigate" claim is not a specific right under the Constitution nor a viable cause of action.

2. Second Element

The second element of the qualified immunity test requires the court to determine whether the right allegedly violated was so "clearly established" as to alert a reasonable officer of his constitutional parameters. Focusing first on the alleged Fourth Amendment violations, the court finds plaintiff Geremia's constitutional right against unreasonable seizures was clearly established as to alert a reasonable officer of his constitutional parameters. In his capacity as a police officer, Detective Ball is charged with the knowledge of the Fourth Amendment's warrant requirement and should have been aware of the probable cause requirement associated with this constitutional provision.

Plaintiff's second claim, however, the Detective Ball "failed to fully investigate the charges against him" is not a right under the Constitution, and as further explained below, it was not 'clearly established" as to alert a reasonable officer of his constitutional parameters. Therefore, Detective Ball was not expected to appreciate his constitutional parameters with respect to this alleged right claimed by plaintiff. Furthermore, plaintiff has not provided any evidence to demonstrate he was entitled to such right.

a. *Constitutional Right to a Police Investigation*

In his Opposition, Plaintiff Geremia criticizes the quality of Detective Ball's investigation into his three arrests. For example, an excerpt from plaintiff's deposition reveals:

Q. Okay. I take it you are--your complaint Against Detective Ball is he should have Come out and interviewed you and your wife and your neighbors, and, therefore he didn't do a complete investigation?

A. Yes, I believe that he should have at least had another police officer or him interview Neighbors and my board of directors, and they might have realized there were Extenuating circumstances relative to why the Tulloses were acting the way they were.

Q. And I take it that you concluded that if he had done that, they would never have filed the criminal charges of Mr. And Mrs. Tullos or submitted them to the D.A.'s office?

A. Well, I believe it isn't too hard to make a phone call, and not even that was done preparatory to arresting me. Nobody would even make a phone call and call Franklin Adams or Kim Murphy or something.

Q. What else did you feel that he did wrong?

A. What he did wrong was nothing. He didn't do anything. That's what he did wrong.

Q. Okay. You thought he should have done something?

A. Well, absolutely.

See Defendant's Motion (#56), Ex. X, pp. 186-187 (Plaintiff's Deposition). Overall, plaintiff asserts Detective Ball failed to conduct a complete investigation. See, e.g. Plaintiff's Opposition (#58) at 4 ("by not investigating, and having only one side of a situation, [Detective Ball] is biased, and not providing a seemingly educated investigation.")

However, plaintiff Geremia fails to recognize there is no constitutional right to a full police investigation. For example, the Supreme Court, in *Baker v. McCollan*, 433U.S. 137, 145-46 (1979), refused to impose a constitutional duty on an officer to anxiously engage in a through investigation of every suspect who asserts innocence. In *Baker*, the Court stated:

> ...[W]e do not think a sheriff executing an arrest warrant Is required by the Constitution to investigate independently every claim of innocence, whether the claim is based on mistaken identity of a defense such as a lack of requisite intent. Nor is the official... required by the Constitution to perform an error-free Investigation of such a claim.

Thus, plaintiff's assertion that Detective Ball's failure to contact his wife deprived him of a constitutional right is not actionable. Nor did defendant Ball's failure to interview some of plaintiff's neighbors or other individuals proposed by plaintiff create a cause of action. The *Baker* court makes it clear that plaintiff Geremia did not have a right to a full police investigation. *Baker*, 443 U.S. 137 (once probable cause exists, officers are not obliged under constitutional duty to explore all investigation angles to further buttress their justifications for arrest); see *Thompson v. Olson*, 798 F. 2d 552, 556 (1st Cir.), cert. denied, 480 U.S. 908 (1987) ("Having once determined that there is probable cause to arrest, an officer should not be required to reassess

his probable cause

conclusion at every turn, whether faced with the discovery of some new evidence or a suspect's self exonerating explanation.")

Moreover, the Seventh Circuit, in *Gramenos v. Jewel Companies, Inc.*, 797 F. 2d 432, 442 (7th Cir. 1986)stated:

> We conclude that the police need not automatically interview available witnesses, on pain of the risk that a jury will require them to pay damages. Good police practice may require interviews, but the Constitution does not require police to follow the best recommended practices. There is a gap, often a wide one, between the wise and the compulsory. To collapse those two concepts is to put the judicial branch in general superintendence of the daily operation of government, which neither the Fourth Amendment nor any another part of the Constitution contemplates.

Additionally, even if Detective Ball was remiss in not conducting more interviews, negligent conduct is insufficient to cause a constitutional deprivation under the Fourteenth Amendment. See *Daniel v. Williams*,474 U.S. 327 (1986): *Davidson v. Cannon*, 474 U.S. 344 (1986); *Herrera v. Millsap*, 862 F. 2d 1157, 1160 (5th Cir. 1989) (summary judgment appropriate when the plaintiff's evidence, at most, showed mere negligence in investigating facts before obtaining arrest warrant). Simply put, in order for plaintiff to even formulate a claim for unreasonable investigation, he must assert facts that, at a minimum, demonstrate Detective Ball acted with deliberate indifference or reckless intent. See *Romero v. Stover*, 45 F. 3d 1472. 1478 (10th Cir. 1995).

In the instant case, plaintiff Geremia simply contends that Detective Ball did not pursue the investigation in the manner he desired. See Plaintiff's Opposition (#58) at 4 (Detective Ball intentionally refused to attempt to obtain sufficient evidence in relation to the suspect's side of the issue, even when requested by plaintiff and his family.). Furthermore, plaintiff merely offers unclear and unsubstantiated claims that he was unfairly treated by LVMPD, Detective Ball, and Justice court Judge Moma.*11* *See Celotex Corp. v. Catrett,* 106 S.Ct. 2548,2553 (1986)(one of the pprincipal purposes of the summary judgment rule is to isolate and dispose of factually unsupported claims or

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11 Plaintiff often cites to documents that have numerous pages, with the expectation that the court will find his supporting evidence. More often than not, this evidence does not exist. In addition, the Ninth Circuit in Keenan v. Allan, 91 F. 3d. 1275, 1279 (9th Cir. 1996), held it is not the task of the district court "to scour the record in search of a genuine issue of triable fact. [The Court relies] on the nonmoving party to identify with reasonable particularity the evidence that precludes summary judgment."

Defenses). The court finds plaintiff is not free to dictate the methods that must be utilized in a police investigation, nor does the court believe Detective Ball or LVMPD acted with deliberate indifference.

Accordingly, plaintiff's complaints of a less than full or negligent police investigation do not rise to the deprivation of a constitutional right, nor was that right so "clearly established" as to alert a reasonable officer of his constitutional parameters. Therefore, in light of the above reasoning, the court's analysis with respect to this claim ends. The court holds defendant Ball is entitled to qualified

immunity on plaintiff's "failure to investigate" claim. investigate' claim.

The court is now only left with plaintiff Geremia's Fourth Amendment claim.

3. Third Element

The third and most determinative prong of the qualified immunity test is whether a reasonable officer would have believed the particular conduct at issue was lawful. In the instant case, the particular conduct at issue is Detective Ball's referral of three cases to the Clark County District Attorney's office that concerned plaintiff Geremia and which eventually led to plaintiff Geremia's arrest on three separate occasions. Plaintiff contends probable cause did not exist for any of these arrests, and as a result, his Fourth Amendment right against unreasonable seizures was violated.

Defendant Ball, on the other hand, asserts that probable cause existed for each referral he made to the Clark County District Attorney's office with respect to plaintiff Geremia and submits documentary evidence to support his position.

In order to justify an arrest by a police officer, "probable cause" generally can be defined as that quantum of evidence which would lead a reasonable and prudent person to believe that the defendant had probably committed the offense. *Ellis v. Zieger*, 449 F. Supp. 24, 26 (E.D. Wis. 1978) (citing *Thornton v. Buchman*, 392 F. 2d 870(9th Cir. 1968), Beck v. Ohio, 379 U.S. 89, 91 (1984) (*citing Henry v. United States*, 361 U.S. 88, 102 (1959)(probable cause to make an arrest exists if the facts and circumstances known to the officer at the moment of the arrest warrant a prudent person to believe a felony has been committed by the arrested person).

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More specifically, in Nevada, the courts have held the quantum of evidence needed to establish probable cause:

> "...may be based on slight, even 'marginal' evidence, *Sheriff v. Badillo*, 95 Nev. 593, 600 P.2d 221 (1979); *Perkins v. Sheriff*, 92 Nev. 180, 547 P. 2d 312 (1976).because it does not involve a determination of the guilt or innocence of an accused. See *Kinsey v. Sheriff*, 87 Nev. 361, 487 P. 2d 340 (1971).

Sheriff v. Simpson, 109 Nev. 430, 435 (1993).

Given these standards in conjunction with plaintiff's contentions, the court must determine whether the facts that were available to Detective Ball would have lead a reasonable and prudent person to believe plaintiff Geremia had probably committed the offenses he was charged with. See *Pendergrast v. United States*, 416 F. 2d 776, 783-84 (D.C. Cir. 1969) ("[w]hen the constitutional validity of an arrest is challenged, it is the function of a court to determine whether the facts available to the officers at the moment of the arrest would 'warrant a man of reasonable caution in the belief' that an offense has been committed by the arrestee").*12*

Therefore, the court will examine each arrest independently and determine if the necessary probable cause existed. If the court finds the requisite probable cause existed for each arrest and a reasonable officer would believe Detective Ball's referrals were lawful, then detective Ball will be entitled to qualified immunity with respect to plaintiff Geremia's Fourth amendment claims.

a. First Arrest

The court finds probable cause existed for plaintiff Geremia's first arrest because Detective Ball was in possession of the following items when he made his referral to the Clark county district Attorney's office: (1) seven statements from different individuals concerning plaintiff's behavior on numerous occasions where he allegedly

intimidated defendants William and Joann Tullos, their two

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12 In *Pendergrast*, the D.C. Circuit held:

This essential determination, however, is not of the actuality of guilt, but rather of its likelihood. The factual predicates for a finding of probable cause need not approach that moral certainty of guild upon which a conviction after trial must rest, but are sufficient through only appearances that a reasonable mind could accept a grounds for believing in guild. "In dealing with probable cause,...as the very name implies, we deal with probabilities. These are not technical; they are factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act. The standard of proof is accordingly correlative to what must be proved." 416 F. 2d at 776-783.

minor daughters, and some of the Tulloses' guest; (2) an incident report regarding plaintiff's harassment of the Tulloses; and (3) a copy of a Protective Order requiring plaintiff Geremia to "refrain from contacting, intimidating, threatening or otherwise interfering with "the Tullos family. See Defendant's Motion (#56), Ex. A (Sheila Patton's Witness Statement); Ex. B(Joey Bombara, III's Statement); Ex. D(a handwritten letter from Thomas Patton to the Monte del Sol Homeowners Association); Ex. E(a typed version of exhibit D with a carbon copy to LVMPD); Ex. F(a typed letter from Sheila Patton to persons unknown); Ex. G(an incident report given to LVMPD by Joanne tullos and her two daughters, Keisha Tullos and Krystal Tullos); Ex. H(Protective Order).

The court finds the substance of these documents formed a sufficient basis to determine that probable cause existed. Thus, premised upon the law in the State of Nevada with regard to the amount of probable cause required, the court finds Detective Ball's referral to the district attorney's

office was proper and a reasonable officer would consider Detective Ball's actions lawful. Detective Ball is therefore entitled to qualified immunity with respect to plaintiff's first arrest.

b. Second Arrest

The court finds probable cause also existed for plaintiff Geremia's second arrest. Prior to the dismissal of the first action, the Tulloses submitted additional reports to the LVMPD regarding plaintiff's alleged violations of the Protective Order.*13* In support of their complaints, Keshia Tullos submitted a voluntary statement to the LVMPD on January 31, 1996, and then, on February 5, 1996, defendant William Tullos submitted a voluntary statement to the LVMPD as well. Id., Ex. M. Moreover, on February 6, 1996, the tulloses filed an incident report with the LVMPD at the Laughlin substation. Id., Ex. N. Also, Detective Ball received two witness statements from Mark Fesler, both dated February 11, 1995, regarding plaintiff's conduct near the Tulloses' home. Id., Ex. AA.

The court finds these complaints and statements formed a sufficient basis to determine that probable cause existed for plaintiff's alleged violations of the Protective Order. Premised upon the

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13 See supra note 6

Law in the State of Nevada with regard to the amount of probable cause required, the court finds Detective Ball's referral to the Clark County District Attorney's office was proper and a reasonable officer would consider Detective Ball's actions lawful. Accordingly, Detective Ball is entitled to qualified immunity with respect to plaintiff's second arrest.

c. Third Arrest

Finally, the court finds probable cause existed for plaintiff Geremia's third arrest. Detective Ball had in his possession complaints and statements from eight individuals, each concerning plaintiff Geremia's harassing behavior. More specifically, sworn statements were given at the ploice station by Trudy May Spencer, William Louis Schuite, Ronda Hibdon, Beverly Freitas, Lisa Hackney, Marie Ellen Hartley, Michelle Anthony, and Theresa Lynn Gregg. Id., Ex. R. In addition, Ms. Freitas and Ms. Hackney both filed complaints against plaintiff Geremia for harassment. Id. Exs. S & T; see also Id. Ex. U(an incident report taken May 14, 1996, listing the victims as Beverly Freitas and Lisa Hackney). Also, Detective Ball was presented with a copy of an Order for Protection issued by the Justice Court on May 14, 1996 to Beverly Freitas and Lisa Hackney against plaintiff Geremia. Id., Ex. V.

Based upon all the statements and documents submitted, the court finds Detective Ball was presented with enough evidence to determine probable cause existed. Thus, premised upon the law in the State of Nevada with regard to the amount of probable cause required, the court finds Detective Ball's referral to the Clark county District Attorney's office was proper and a reasonable officer would consider Detective Ball's actions lawful. Accordingly, Detective Ball is entitled to qualified immunity with respect to plaintiff's third arrest.

In sum, the court finds defendant Detective Ball took reasonable steps throughout each of his investigations. As the evidence demonstrates, in each investigation, Detective Ball collected the relevant evidence presented to him, determined the requisite probable cause existed, and then turned over the investigation to the Clark County Cistrict Attorney's office for further review and prosecution. The court draws no negative inference from the District

Attorney's decision to charge plaintiff Geremia with different crimes. As long as probable cause existed for these crimes, no

Fourth Amendment violation occurred. Thus, detective Ball is granted qualified immunity upon all of plaintiff's Fourth Amendment causes of action and any derivative claims stemming therefrom.

Furthermore, a reasonable officer reviewing the facts, as submitted to the LVMPD, could have concluded that ample probable cause existed for the submission of these matters to the Clark Coounty District Attorney's office for review and prosecution. At the same time, the court also finds the defendant has satisfied its burden of demonstrating the absence of a genuine issue of material fact with respect to his Qualified Immunity claim, even when the evidence is viewed in a light most favorable to plaintiff. See Zoslaw v. MCA Distr. Corp., 693 F.2d 870, 883 (9th Cir.), cert. denied, 460 U.S. 1085 (1983); Adickes v. S.H. Kress & Co., 398 U.S. 144, 157 (1970). Furthermore, plaintiff is unable to show by specific facts the existence of a genuine issue for trial. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250 (1986). Although plaintiff has submitted evidence in support on his Opposition motion, the court finds the evidence is merely colorable and not significantly probative. Thus, defendant's summary judgment motion is granted on this issue. Id. At 249-50.

C. Intervening Act

Notwithstanding the court's finding that Detective Ball had probable cause for each of plaintiff Geremia's arrests, it appears under the Ninth Circuit standard set in

Smiddy v. Varney, 665 F. 2d 261 (9th cir. 1981) that the Clark County Cistrict Attorney's office filing of a criminal complaint in each instance was an "intervening act" which cut off all of Detective Ball's liability under 42 U.S. 1983 for plaintiff's arrest, incarceration, and prosecution.

In *Smiddy*, a woman's body was found in a storage closet on a construction site and the police officers determined that she was last seen alive with the plaintiff, Mr. Smiddy. Mr. Smiddy was eventually arrested for murder, yet the charges were subsequently dropped. Smiddy therafter filed a civil rights action against the officers who arrested him and obtained a judgment. The Ninth Circuit, however, reversed and held the District Attorney's filing of a criminal complaint was "an intervening act." From that date forward, therefore, the defendant police officers and police department could not be held legally responsible. The Court specifically held:

> Filing of a criminal complaint immunizes investigating officers such as the appellants from damages suffered thereafter because it is presumed that the prosecutor filing the complaint exercised independent judgment in determining that probable cause for an accuser's arrest exists at that time....Thus, we hold that where police officers do not act maliciously or with reckless disregard for the rights of an arrested person, thay are not liable for damages suffered by dthe arrested person after a district attorney files charges unless the presuption of independent judgment by the district attorney is rebutted . This result is just because the other actors who decided to continue to hold Skiddy, the district attorney and the municipal court judge, are absolutely immune from liability under section 1983. Id. At 266-67, *Imbler v. Pachtman*, 424 U.S. 409 (1976)(prosecutors); *Pierson v Ray*, 386 U.S. 547 (1967) (judges). A police officer's lot

> already is unfortunate because it is he who often is the only actor in the chain of decisions leading to prosecution who is subject to section 1983 liability. We need not make it more unfortunate by holding the officer liable for damages that is the result of the intervening fault of others in the chain.

See also *Ames v. United States*, 600 F.2d 183 (8th cir. 1979)(cited with approval by the Ninth Circuit); *Delliums v. Powell*, 566 F.2d 167 (D.C. Cir. 1977).

The court finds *Smiddy* clearly establishes that the legal liability of Detective Ball and LVMPD terminated once the case was turned over to the Clark County district Attorney's office. The evidence reveals it was their office that approved the cases for prosecution, not Detective Ball or LVMPD. As demonstrated earlier, it is undisputed that the Clark County Cistrict Attorney's office approved each case for prosecution upon its own independent evaluation and it was their office that requested plaintiff's arrest for each criminal matter. Thus, the District attorney's decision to prosecute was the "intervening act" between Detective Ball's investigation and plaintiff Geremia's arrest. The chain of causation was broken when Detective Ball closed his file and the District Attorney's office subsequently chose to prosecute the charges based on its own findings.

The only exception to the rule, as set forth in the above case law, is if the police officer fraudulently withheld evidence or wrongfully influenced the District attorney's office. This is not a concern in the instant case, because there is no proof of any such activity by Detective Ball or any other officer of the LVMPD.

Accordingly, even assuming Detective Ball was mistaken in his determination of probable cause, it is clear that there can be no resulting liability by Detective Ball based on the above facts and supporting case law.

Futhermore, plaintiff Geremia has failed to provide any controvert evidence or legal support to dispute the substantial authority set forth by Detective Ball that the filing of a criminal complaint by the District Attorny's office immunizes investigation officers from damages suffered theafter.

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D. Malicious Prosecution

Plaintiff Geremia also brings a claim for malicious prosecution against defendant Detective Ball. Malicious prosecution claims are normally not cognizable under section 1983 if process is available within the state judicial system to provide a remedy. See *Usher v. City of Los Angeles,* 828 F. 2d 556, 561 (9th Cir. 1987). A court may consider such a claim, however, when the malicious prosecution is allegedly intended to deprive a person of the equal protection of the laws or other constitutional rights. Id. At 562. Before a court may decide whether the prosecution was conducted with the intent to deprive an individual of his constitutional rights, a court must first decide whether such a claim has been established under the applicable state law.

In Nevada, the prima facie elements of the tort of malicious prosecution are: (1) want of probable cause to initiate the prior criminal proceeding; (2) malice;(3) favorable termination of litigation; and (4) resulting damages. *Chapman v. city of Reno,* 85 Nev. 365, 369 (1969).

Addressing the first element, the court has already found that probable cause existed for each of plaintiff Geremia's arrests. Thus, plaintiff cannot satisfy this element.

Second, the court finds plaintiff Geremia has not presented any facts which demonstrate malice on the part of Detective Ball or LVMPD, Actually, the evidence reflects just the opposite. The evidence reveals Detective Ball took reasonable steps throughout each of his investigations. He collected the relevant evidence presented to him, determined the requisite probable cause existed, and then turned over the investigation to the Clark County Cistrict Attorney's office for further review.

Finally, plaintiff cannot prove a favorable termination of litigation. The simple fact is that Detective Ball and LVMPD did not prosecute the charges against plaintiff. It was the Clark County District Attorney's office that made the independent decision to go forward with these cases. Therefore, plaintiff cannot establish a favorable termination of litigation with respect to Detective Ball or LVMPD.

As plaintiff fails on each element of this claim, the court finds plaintiff Geremia cannot state a viable cause of action for malicious prosecution against Detective Ball.

E. Timing

Plaintiff contends summary judgment is not appropriate at this time because he requires additional discovery to support his claims. However, the discovery cut-off date in this matter has passed.*14* See Joint Motion to Reopen Discovery (#35). Further, plaintiff suggests he will retain an expert to support his allegations against Detective Ball and the LVMPD. Again, the last date to identify experts was October 18, 1998. Therefore, plaintiff's opposition to summary judgment regarding his plans to conduct further discovery is unpersuasive and untimely.

Additionally, the court finds "[b]ecause qualified immunity is designed to protect the officer, not only from

monetary damages liability, but even from the costs of suit, the determination must be made as soon as possible." *Siegart v Gilley,* 111 S. Ct. 1789 (1991).

> [T]he question of whether a reasonable officer could have believed his conduct was proper under established law is a question of law that must be determined by the district court at the earliest possible point in the litigation. Where the facts underlying the qualified immunity determination are not in dispute, the determination should be made at summary judgment, and the court is obliged to make every effort to develop the record to the extent necessary to make the determination at that stage.

Act Up!/Portland v. Bagley, 971 F.2d 298, 301-02 (9th Cir.), *withdrawn on other grounds,* 988 F.2d 868 (9th Cir. 1993) (emphasis added).

Based on the facts and evidence before it, the court finds now is the appropriate time to rule on defendant Ball's motion for summary judgment.

F. Supplemental Jurisdiction

When the federal cause of action has been dismissed, there is "no independent federal claim confer[ring] subject matter jurisdiction on the federal court. Without a federal claim on which to append the related state causes of action, the federal court has no basis for asserting jurisdiction over [the plaintiff's state law]...claim[s]." *Aragon v. Federated Department Stores,* 750 F.2d 1447, 1457-58 (9th Cir. 1985).

In the instant case, all of plaintiff's federal claims have been adjudicated in favor of the

14 The court, however, did order discovery re-opened for the limited purpose of taking the depositions of William and Joann Tullos. See Order (#72). Nevertheless, the court believes the depositions of these parties will not influence the court's decision with respect to the matters now before it.

Defendants, See Orders (#34,44,72,73,74,75,76). Thus, plaintiff Geremia has no federal claims remaining before the court. As a result, the court declines to exercise supplemental jurisdiction over plaintiff's remaining state law claims. See *Les Shockley Racing* v. *National Hot Rod Ass'n,* 884 F.2d 504, 509 (9th Cir. 1989)("[w]hen the court dismisses the federal claim leaving only state claims for resolution, the court should decline jurisdiction over the state claims and dismiss them without prejudice.")

Accordingly, the court dismisses plaintiff's action without prejudice, leaving the state claims to be tried in the appropriate state forum if plaintiff chooses.

Conclusion

Accordingly, **IT IS ORDERED** that defendant's motion (#56) be GRANTED.

IT IS FURTHER ORDERED that the court dismisses plaintiff's action without prejudice, since it declines to exercise supplemental jurisdiction over plaintiff's remaining state law claims. See 28 U.S.C. 1367(c).

IT IS FURTHER ORDERED THAT Plaintiff's Request for a Permanent Trial Date (#71) is DENIED because it now moot.

DATED: This 25th day of June, 1999.

DAVID HAGIN

UNITED STATES DISTRICT JUDGE

U.S.District Court
District of Nevada
Order Entered and Served June 10, 1999

Before the court is defendant Las Vegas Metropolitan Police Department's ("LVMPD") Motion (#55) for Summary Judgment regarding Official Capacity, Inadequate Supervision and Training, and Punitive Damages. Plaintiff has opposed (#59) and defendant has replied(#63). For the reasons stated below, the court grants defendant's motion on each issue.

Introduction

Plaintiff has instituted a civil rights action against defendants LVMPD, Detective Thomas Ball, William and Joann tullos, and Justice Court Judge William Moma. In his Complaint, plaintiff asserts his constitutional rights were violated during the course of a police investigation, arrest, and prosecution by the Clark County District Attorney's Office. Plaintiff claims his First, Fourth, Fifth, Eighth, and Fourteenth Amendment constitutional rights were violated. Plaintiff also maintains claims for false arrest, false imprisonment, malicious prosecution, intentional infliction of emotional distress and negligent infliction of emotional distress all under the laws of the State of Nevada.

Factual Background

This lawsuit stems from citizens' complaints and statements submitted to the LVMPD, Laughlin Substation, in early July of 1995.*1 See* Defendant's Motion (#55) at 3. These complaints and statements described plaintiff's behavior on numerous occasions where he allegedly intimidated defendants William and Joann Tullos, their two monor daughters, and some of the Tulloses' guest.

Defendant Thomas ball is a detective with the LVMPD. In the course of his duties as a detective, defendant ball received the above complaints and statements pertaining to plaintiff. Detective Ball also received a sworn statement by Joann Tullos2 and a copy of a Protective Order requiring plaintiff Geremia to "refain from contacting, intimidating, threatening or otherwise interfering with"the Tullos family.3 Id., Ex.A.

Upon receipt of this information, Detective Ball packaged the above referenced materials and on July 17, 1995, prepared a Declaration in support of a Warrant/Summons for plaintiff's alleged activities. The file was then submitted to the Clark county District Attorney's office for further review.

On or about July 26, 1995, Detective Ball received a notice from the District attorney's office stating that the package he submitted with the Declaration in support of a Warrant/Summons was denied for prosecution. Id.,Ex.D. the document itself indicated that the denial was premised upon "insufficient evidence." Id. However, the Deputy district Attorney, Karen Van De Pol, also indicated that the matter could be resubmitted, if the plaintiff, John Geremia, violated the protective

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*1*Plaintiff contends thesee complaints and statements were neither voluntary nor genuine. See Plaintiff's Motion (#59) at 1. The court, however, rejects plaintiff's argument since he has not provided any evidence to support this theory. By simply labeling witnesses as convicted child molesters and convicted felons without any further evidentiary support, plaintiff does not inject any credibility into his argument. The use of unsubstantiated allegations does not raise a genuine issue of material fact.

2The sworn statement of defendant Joann tullos was one page in length, dated July 5, 1995. See Defendant's Motion (#55),Ex.C.

3The protective Order was dated July 5, 1995 and signed by defendant Justice Court Judge William Moma of the Clark County Justice Court. In conjunction with the protective order, Detective Ball also received "instructions to the Sheriff" dated July 5, 1995. Id.Ex.B.

Order. Id. Nevertheless, on July 28, 1995, the case was cleared by Detective Ball and closed out with no further action. Id.,Ex.E.

Unbeknownst to Detective Ball, the Clark County district Attorney's office thereafter filed a criminal charge against plaintiff Geremia for misdemeanor stalking and an arrest warrant was submitted to defendant Justice Court Judge William Moma. Id.,Ex.F at 3,14. The warrant was signed by Judge Moma and plaintiff Geremia was arrested on September 12, 1995.

On September 15, 1995, plaintiff Geremia pled not guilty to the charges. Id., Ex. G. He was tried on November 30, 1995 and convicted of the misdemeanor charge of stalking. The conviction was later overturned on appeal and the matter, which was reset for trial on multiple occasions, was eventually dismissed by the District Attorney's office on its own motion.

Meanwhile, prior to the dismissal of the misdemeanor action, the Tulloses submitted additional reports to the LVMPD regarding plaintiff's alleged violations of the protective order.4 In support of their complaints, Keshia Tullos submitted a voluntary statement to the LVMPD on January 31, 1996, and then on February 5, 1996, defendant William Tullos submitted a voluntary statement to the LVMPD as well.5 Id.,Ex.H. Moreover, on February 6, 1996, the Tulloses filed an incident report with the LVMPD

at the Laughlin substation. Id.,Ex.I.

Once again, Detective Ball put all the materials together and submitted them to the Clark County district attorney's office. The District Attorney's office, however, requested a certified copy of the protective order before considering going forward with the case. Id., Ex.J. In the meantime, Detective Ball also received two witness statements from Mark Fesler, both dated

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4On at least two occasions, plaintiff allegedly followed Keshia Tullos, making"rude remarks and scary noises" which caused Keshia to become scared and to run home. Plaintiff also allegedly looked through the Tulloses'bathroom window with binoculars while Mrs. Tullos was in the bathroom. Plaintiff allegedly flipped the"bird" at the Tulloses and swore at them. Plaintiff is also alleged to have stopped friends of Keshia tullos, yelling profanities at them, as they left the Tulloses' home.

5Plaintiff claims the statement from defendant William Tullos was the only statement relating to the issue of staling and that statement was hearsay. See Plaintiff's Motion (#59) at 1-2. The court rejects plaintiff's claim for being against the weight of the evidence. Individuals, other than William Tullos, have filed statements concerning plaintiff's alleged stalking. See,e.g. Defendant's Motion (#55),Ex.H(Statement by Keshia Tullos)

February 11, 1995, regarding plaintiff's conduct near the Tulloses' home. Id.,Ex.K.

On March 14, 1996, the district attorney's office has already decided to pursue the case and submitted a Warrant of arrest to defendant Justice Court Judge Moma for his approval. Judge Moma signed the arrest warrant and plaintiff Geremia was arrested that same day. Prior to the submission of the arrest warrant, a criminal complaint was also filed by the district Attorney's office. Id.,Ex.M. However, this matter would eventually be dismissed with prejudice on

February 27, 1997.[6]

In or about April 1996, plaintiff Geremia had a further incident with coaches of a local kids' team of which his daughter was a member. As a result of the confrontations with the coaches, complaints were made to the LVMPD and statements were provided. More specifically sworn complaints were given at the police station by Beverly Freitas and Lisa Hackney. Ms. Freitas and Ms. Hackney both filed complaints against plaintiff Geremia for harassment. Id., Exs. N & O; see also Id., Ex. P (an incident report taken May, 1996, listing the victims as Beverly Freitas and Lisa

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[6]Plaintiff contends the Justice Court, not the district Attorney's office, repeatedly sought his arrest, despite the district Attorney's office's determination that there was no prosecutorial merit in the matters. See Plaintiff's Opposition (#59) at 2. Plaintiff argues, of the numerous alleged charges, only one had a criminal arrest warrant filed by the District Attorney's office and this was dismissed with prejudice. Id. The other charges, plaintiff claims, were initiated by warrant and?or summons placed in front of Justice Court Judge Moma by Detective Ball. Id.

Once again, the court rejects plaintiff's arguments as being against the weight of the evidence. Plaintiff is alleging that Justice court Judge Moma and Detective Ball were the driving forces behind his arrests, not the Clark county District Attorney's office. However, in each of the aforementioned matters that went to criminal complaints, Detective Ball simply submitted the matters to the District Attorney's office and it was thierdecision whether or not to prosecute. For example, two ot the three submissions by Detective Ball were denied by the District Attorney's office for various reasons referenced above. It was only thereafter that the District Attorney's office made independent decisions to prosecute. The evidence demonstrates that the District Attorney's office decided to seek arrest warrants rather than summons and it was the District Attorney's office who

prepared and signed the criminal complaints, not Detective Ball or Justice Court Judge Moma. See Deffendant's Motion (#55),Ex. W at 48,66,73. The evidence also reveals Detective Ball was not aware of the District Attorney's office's intentions to prosecute plaintiff Geremia and in some instances ho only learned of the prosecution when the warrants were served upon plaintiff and/or he was confronted by plaintiff's wife, Lynn Geremia, at the Laughlin substation. Id. At 48,66,71,73.

Similarly, Justice Court Judge Moma's role was to sit as an objective judicial body, not as a vindictive, zealous prosecutor as plaintiff alleges. That is simply not the case and the evidence does not support such a theory at this time.

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Once again, Detective Ball packaged the materials together and submitted them to the district Attorney's office for further review. Id., EX. W. Included in this submission was a copy of an Order for Protection issued by the Justice Court on May 14, 1996 to Beverly Freitas and Lisa Hackney against plaintiff Geremia. Id., Ex. Q. However, on May 24, 1996, the District Attorney's office denied the prosecution stating it "lack[ed] prosecutorial merit." Detective Ball then closed out his file on July 17, 1996. Id. Ex.R.

A. **Motion for Summary Judgment**

Summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." *Fed. R. Civ. P. 56(c).* The burden of demonstrating the absence of a genuine issue of material fact lies with the moving party, *Zoslaw v. MCA Distr. Corp. 693 F. 2d 870, 883 (9th Cir.).cert. Denied, 460* U.S. 1085(1983), and for this purpose, the material lodged by the moving party must be viewed in a light most favorable to the nonmoving party.

Adickes v. S.H. Kress & Co., 398 U.S. 144, 157 (1970); *Baker v. Centenial Ins. Co.*, 970 F. 2d 660,662 (9th Cir. 1992). A material issue of fact is one that affects the outcome of the litigation and requires a trial to resolve the differing versions of the truth. *S.E.C. v. Seaboard Corp.* , 677 F. 2d 1301, 1306 (9th Cir. 1982).

Once the moving party presents evidence that would call for judgment as a matter of law at trial if left uncontroversial, the repondent must show by specifid facts the existence of a genuine issue for trial. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 259 (1986).

> [T]here is no genuine issue of fact for trial unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party. If the evidence is Merely colorable, or is not significantly probative, Summary judgment may be granted.

Id. At 249-50 (citations omitted). 'a mere scintilla of evidence will not do, for a jury is permitted to draw only those inferences of which the evidence is reasonably susceptible; it may not resort to speculation." *British Airways Board v. Boeing Co.*, 585 F. 2d 946, 952 (9th Cir.), cert. Denied, 440 U.S. 981 (1979). Moreover, if the factual context makes the nonmoving party's claim implausible,

that party must come forward with more persuasive evidence than otherwise would be necessary to show there is a genuine issue for trial. *Matsushita Elec. Indus. Co., Ltd v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986); *California Architectural Bldg. Products v. Franciscan Ceramics, Inc.* 818 F.2d 1466, 1468 (9th Cir.), cert. denied, 484 U.S. 1006(1988)

If the party seeking summary judgment meets its burden, then summary judgment will be granted unless there is significant probative evidence tending to support the

opponent's legal theory. *First National Bank of Ariz. V. Cities Serv. Co. 391 U.S. 253, 290 (1968); Commodity Futures Trading Commisson v. Savage,* 611 F. 2d 270, 282 (9th Cir. 1979).

In the instant case, defendant Detective Ball brings this motion for summary judgment relying on the doctrine of Qualified Immunity. Defendant contends he is entitled to such immunity because the Ninth Circuit's three part test to invoke the doctrine is satisfied. More specifically, defendant Ball asserts there was probable cause for each case he referred to the Clark County District Attorney's office that concerned plaintiff Geremia. In addition, defendant also argues that plaintiff's malicious prosecution claim fails on the merits. In sum, defendant Ball claims summary judgment is warranted in his favor, especially in light of all the supporting evidence and exhibits attached to his motion and the non-existence of any genuine issues of material fact.

On the other hand, plaintiff contends defendant Ball is not entitled to qualified immunity as "[t]here is a chain of conduct by the defendants which plaintiff believes rises to he level of conspiracy, perjury……violations of [j]judicial conduct, coercion of statements and witnesses by LVMPD, and encouragement or solicitation of statements from known felons and child molesters to make an unwarranted case." Plaintiff's Motion (#58) at 5. As a result, plaintiff believes that genuine issues of material fact exist and defendant's motion should be denied. Id. At 10 ('there are many issues of material fact that need to be decided by a jury").

As will be demonstrated below, the court finds no genuine issues of material fact exist, and at the same time, grants defendant's motion on all three issues.

B. Practice, Policy or Custom

1. LVMPD

Plaintiff Geremia claims LVMPD has promulgated a practice, policy, or custom of having its officers"harass and intimidate persons by filing false charges and otherwise require[ing] individuals

to defend themselves and incur burdensome expenses and legal fees." Amended Complaint,27. As part of this alleged unconstitutional "de facto" plicy, plaintiff also contends LVMPD has a policy or custom of encouraging witness statements from individuals of questionable character. See Plaintiff's Motion (#59) at 10 (encouraging or soliciting statements from witnesses of low character).

Defendant, however, brings this motion for summary judgment arguing"in the absence of evidence showing a LVMPD policy, practice and/or custom caused a constitutional depreciation, a 1983 official capacity or municipal liability claim against LVMPD is without merit." See Defendant's Motion (#55) at 9-10. In addition, defendant contends since there are no genuine issues of material fact, summary judgment is warranted in its favor.

The United States Supreme court has ruled a municipality may be held liable in a 1983 suit, only when the municipality's existing policy7 or custom8 is the moving force behind its employees undertaking unconstitutional actions. See *Monell v. Dep't. of Soc. Svcs.*, 436 U.S. 658,690-691 (1978). *Polk County v. Dodson,* 454 U.S. 312,326 (1981)(a municipality's official policy must be "the moving force of the constitutional violation" in order to establish liability of a government body under 1983; *Oklahoma City v. Tuttle,* 471 U.S. 808,820 (1985) (the governmental entity's "policy or custom" must have caused the violation of federal law or rights); *Kentucky v. Graham, 473* U.S. 159,166 (1985) (an official capacity suit is viable only when the underlying governmental entity is the moving

force behind the constitutional deprivation--thus, in an official capacity suit the entity's "policy or custom" must have played a part in the violation of federal law); *Pembaur v. City of Cincinnati,* 475 U.S. 469, 483-484 (1986) ("[m]unicipal liability under 1983 attaches where-and only where-deliberate choice to follow a course of action is

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7 The "official policy" requirement is intended to distinguish acts of the municipality from the acts of its employees, thereby making clear that municipal liability is limited to actions for which the municipality is actually responsible. See *Penbraur v. City of Cincinnati,* 475 U.S. 469, 479-80 (1986). "[The] *Monell* [Court] reasoned that recovery from a municipality is limited to acts that are, properly speaking, acts'of the municipality'-that is, acts which the municipality has officially sanctioned or ordered."Id.

8 Local governments may be sued for constittional deprivations which have a direct causal link to a governmental "custom", even though such a custom has not received formal approval through the body's official decision-making channels. *Monell,* 436 U.S. at 690-691.

Made from among various alternatives by the...officials responsible for establishing final policy with respect to the subject matter in question."). Therefore, the question before the court is whether plaintiff Geremia has provided sufficient evidence to demonstrate LVMPD had an official policy or custom which was the moving force behind Detective Ball's alleged violations of plaintiff's constitutional rights.

The task of establishing municipal liability is a difficult one. See *City of canton v. Harris,* 489 U.S. 378, 385 (1989). The critical inquiry in an official capacity suit, such as the instant one against a municipal police

department, requires that the alleged constitutional deprivations come directly from a plan or policy of the state, municipality or political subdivision. *Monell,* 436 U.S. at 690; *City of Cantom,* 489 U.S. at 385 ("Our first inquiry in any case alleging municipal liability under 1983 is the question whether there is a direct casual link between a municipal policy or custom and the alleged constitutional deprivation"). Although the Supreme Court in *Monell v Dep't. of Soc. Svcs* established tha a claim against a municipal entity is cognizable under 1983; it will only yield liability when the "execution of the government's policy or custom...inflicts the injury." *Monell,* 436 U.S. at 694.

Plaintiff alleges LVMPD has enacted an unconstitutional "de facto" policy causing its officers to pursue unfounded charges and harass citizens under its protection. More specifically, plaintiff contends Detective Ball harassed and intimidated him, brought false charges against him, and caused his arrest on several occasions without sufficient evidence. Plaintiff claims each of these actions by Detective Ball were pursuant to a LVMPD policy, practice, or custom. Moreover, plaintiff provides the following examples which he claims establishes a custom or practice by defendants9 See Plaintiff's Motion (#59) at 10.

1. The LVMPD and Detective Ball have a history of arrests that "[amount to little more than a continuing Harassment of plaintiff." See Plaintiff's Ex. 1&2 (Trial Transcript of State of Nevad v. John Geremia); Plaintiff's Ex. 3(Deposition of Tom Patton);

2. The LVMPD and Detective Ball have committed a pattern of encouraging or soliciting statements from witnesses of "low character." See Plaintiff's Ex. 2,p. 45, lines 6-12 (Joan

9 Plaintiff makes other allegations against LVMPD's co-defendants, yet these allegations are not relevant to the issue of Official Capacity.

Tullos's statement at trial); Plaintiff's Ex. 2,page 63, line 1-3 (Joan Tullos's statement); Plaintiff's Ex. 12 (alleged Evidence of collusion); Defendant's Ex. A(Sheila Patton);10 Plaintiff's Exhibit 15 (tom Patton's Deposition): Plaintiff's Ex. 13 (copy of photo).

3. The LVMPD failed to produce and arguably destroyed exculpatory evidence.*11* See Plaintiff's Ex. 2,. Pages 1-2; Id. At 116-18 (Trial Transcript: Testimony of Krystal Tullos), IdId. At 95, lines 10-14 (Testimony of Keshia Tullos);

4. The LVMPD and Detective Ball had plaintiff Followed "almost bumper to bumper" in an Attempt to drive him our of town. See Plaintiff's Ex. 16 (Statement from Amber Geremia); Plaintiff's Ex. 17 (Joe Geremia); Plaintiff's Ex. 18 (John Geremia's Deposition);

5. The LVMPD and Judge Moma engaged in collusion And coercion against plaintiff.*12*

6. The LVMPD and a nondefendant officer, Michael Kruz, threatened plaintiff with "statements." See Plaintiff's Ex.19;*13*

7. The LVMPD and Detective Ball arrested plaintiff After the District Attorney's Office indicated there were not any grounds to proceed. See Plaintiff's Ex. 14 (Letter From D.A. to plaintiff);

8. Plaintiff alleges the existence of a conspiracy with Respect to discovery documents and also believes there Was coaching of witnesses by LVMPD at his previous Trials.*15* See Plaintiff's Ex. 3 (Tom Patton's Deposition); Defendant's Exs. "D" & "E"; Plaintiff's Exs. 1,19,&20 (Coaching).

In sum, plaintiff's claim is that policy-making LVMPD officials authorized detectives, like defendant Ball, to harass and intimidate citizens such that it was "so permanent and well-settled as to constitute a custom or usage with the force of law." *Bouman v. Block*, 940 F. 2d 1211, 1231 (9th Cir. 1991).

However, contrary to plaintiff's assertions, the court finds there is no evidence of a "direct

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10 Plaintiff claims he has the right to impeach the testimony provided in defendant's exhibit "A" which he contends is the statement of Sheila Patton at the time of trial. However, defendant's exhibit "A" is not a statement by Sheila Patton, but rather a copy of a Protective Order requiring plaintiff Geremia to "refrain from contacting, intimidating, threatening or otherwise interfering with "the Tullos family.

11 The precise evidence referred to is unknown. Plaintiff cites do not support his argument. Moreover, the court has already ruled on plaintiff's motion with respect to Joan tullos' one page statement.

12 Plaintiff has not provided any evidence to support this theory.

13 The statements referred to by plaintiff are unknown. Contrary to plaintiff's allegations, his Exhibit #19 is not his affidavit in support of his Opposition. It is the deposition of Lynn Geremia.

Casual link" between a specific' de facto" policy embracing plaintiff's allegations and any alleged constitutional deprivation. *City of Canton,* 489 U.S. at 385. The touchstone of a 1983 action against a municipal defendant is the existence of a custom or policy responsible for an unconstitutional deprivation. Yet, plaintiff's claims do not evidence such a deficient plicy so as to constitute a 'direct causal link' between a LVMPD policy, custom, or practive and plaintiff's alleged injuries. For example, an excerpt from plaintiff's deposition reveals:

> Q: In your complaint you allege that the police department harasses and intimidates people by filing false charges. What do you base that allegation on?
> A: (No response.)
> Q: In other words, what police officer has filed false charges against you?
> A: I believe the Complaint-the intentions are-is that with-it's false because it didn't happen. Tom Ball would proceed with things without any evidence there-they didn't happen.

See Defendant's Ex. T,p. 179-80 (Deposition of John Geremia)

Plaintiff's vague allegation and explanation is just one of the many examples where he cannot establish the necessary "direct casual link". Furthermore, the court reject plaintiff's characterization of Detective Ball's investigation as it is against the weight of the evidence. The evidence reveals defendant Detective Ball took reasonable steps

throughout each of his investigations. As the evidence demonstrates, in each investigation, Detective Ball collected the relevant evidence presented to him, determined the requisite probable cause existed, and then turned over the investigation to the Clark County District Attorney's office for further review. Plaintiff has not provided evidence to the contrary, nor has plaintiff shown an unconstitutional "de facto" policy by LVMPD, harassment or intimidation by Detective ball, nor has plaintiff presented evidence of LVMPD encouraging statements from witnesses of questionable character. Plaintiff merely offers unclear and unsubstantiated claims that he was unfairly treated by LVMPD, Detective Ball, and Justice Court Judge Moma.*16* See *Celotex Corp. v. Catrett,* 106 S. Ct. 2548, 2553, (1986) (one of the principal purposes of the summary judgment rule is to isolate and dispose of factually unsupported

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16 Plaintiff often cites to documents tha have numerous pages, with the expectation that the court will find his supporting evidence. More often than not, this evidence does not exist.

Claims or defenses). Moreover, even plaintiff's arguments which have evidentiary support, simply do not supply the "direct casual link" required by supreme Court precedent. There must be significant evidence to show that a policy existed specifically authorizing or condoning the alleged practice. See *Davis. City of Ellenburg,* 869 F.2d 1230, 1234 (9th cir. 1989). Yet, plaintiff has simply not met this burden. Plaintiff Geremia has not presented any evidence to demonstrate that a higher ranking LVMPD employee, with policymaking authority, promulgated a practice, policy, or custom of having LVMPD officers "harass and intimidate persons by filing false charges and otherwise requir[ing] individuals to defend themselves and incur burdensome

expenses and legal fees."

At the same time, the court finds the defendant has satisfied its burden of demonstrating the absence of a genuine issue of material fact with respect to plaintiff's official capacity claim, even when the evidence is viewed in a light most favorable to plaintiff. See *Zoslaw v. MCA Distr. Corp.*, 693 F. 2d 870, 883 (9th Cir.), cert. Denied, 460 U.S. 1085 (1983). *Adickes v. S.H. Kress & Co.*, 398 U.S. 133, 157 (1970). Furthermore, plaintiff is unable to show by specific facts the existence of a genuine issue for trial. See *Anderson v. Liberty Lobby, Inc.* 477 U.S. 242, 250 (1986). Although plaintiff has submitted evidence in support of his Opposition motion, the court finds the evidence is merely colorable and not significantly probative of the existence of a municipal policy or custom as required under 42 U.S. 1983. Therefore, the court finds LVMPD cannot be held liable for the alleged violations of plaintiff's constitutional rights and defendant's summary judgment motion is granted on this issue.*17* Id. At 249-250.

2. Detective Thomas Ball

Plaintiff Germia has sued defendant Deective Ball in His official capacity. However, "[a] suit against a governmental officer in his official capacity is equivalent to a suit against the government entity itself." *Larenz v. Dity of Los Angeles,* 946 F. 2d 630, 646 (9th Cir. 1991); *Lewis*

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17 Even assuming plaintiff could prove a viable cause of action against Detective Ball, the court finds LVMPD still cannot be held because it ws not the moving force behind the violation. *Monell,* 436 U.S. at 690-91 ('we conclude that a municipality cannot be held liable solely because it employs a tortfeasor-or, in other words, a municipality cannot be held liable under 1983 on a respondeat superior [or vicarious liability]theory."), *Pembaur,* 475 U.S. at 478.

v. Sacramento County, 98 F. 3d 434, 446 (9th Cir. 1996). Therefore, Detective ball could only be found liable in his official capacity, if a LVMPD policy, custom, or practice was the moving force behind the alleged unconstitutional deprivations suffered by plaintiff.

In light of the court's decision above, finding that plaintiff Geremia has not demonstrated such a "direct causal link," plaintiff cannot maintain a cause of action against Detective Ball in his official capacity.

C. LVMPD's Training, Supervision, and Discipline

Plaintiff geremia also claims LVMPD had a policy or custom of inadequately training or supervising its police officers, resulting in "deliberate indifference" to the rights of persons similarly situated. See Amended complaint, 29.

The adequacy of police training with respect to 1983 liability was discussed by the United states Supreme Court in *City of Canton v. Harris.* In *Canton*, the Supreme Court held "[I]nadequacy of police training may serve as the basis for 1983 liability, only where the failure to train amounts to deliberate indifference to the rights of persons with whom the police come into contact." 489 U.S. at 388.

Given this doctrine, the Ninth Circuit has directed district courts to first determine whether "the existing program is adequate." *Merritt v. County of Los Angeles,* 875 F. 2d 765,770(9th Cir. 1989). As part of this analysis,"[t]he adequacy of a particular program must be resolved in relation to the tasks the particular ollicers must perform." Id. Moreover, a training program will be deemed adequate if it "enable[s] officers to respond properly to the usual and recurring situations with which they must deal."*18 Id.*

18 Even if the court found detective ball's behavior unreasonable in a particular incident, which it does not, the actions of an officer at the time of the incident, alone, are a clearly insufficient basis for imposing liability on LVMPD. See *City of Canton,* 489 U.S. at 378 ("[a]adequately trained officers occasionally make mistakes; the fact that they do says little about the training program or the legal basis for holding the city liable'). *Tuttle,* 471 U.s. at 823-24 (a single act of a non-policymaking employee cannot give rise to municipal liability; *Merritt,* 875 F.2d at 770' *Davis*, 869 F.29 at 1234("a plaintiff cannot prove the existence of a municipal policy or custom based solely on the occurrence of a single incident of unconstitutional action by a non-policy making employee").

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Plaintiff's only allegation regarding detective Ball's supposedly inadequate training is the bare allegation forming the basis of his complaint. Plaintiff's theory is that his case was ineffectively investigated, resulting in unreasonable charges, and thus, it must have been the result of Detective Ball's inadequate training.

The court, however, finds the evidence reflects just the opposite. Beginning with his training in the academy, Detective Ball has gone through extensive training for stalking cases.*19* See Defendant's Motion (#55), Ex. F,pp. 15-17 (Deposition of Detective Ball). Detective Ball testified in his deposition that when stalking became a nationally recognized crime, LVMPD offered more extensive classes and even still provides its officers with regular updates when there are changes in the stalking laws. Id. Thus, the court finds LVMPD's training is extensive, comprehensive and meets the Ninth Circuit's adequacy test set forth in *Merritt*. Furthermore, the court recognizes Detective Ball has had the benefit of receiving such extensive training.

Nevertheless, even if the court found the training was inadequate, municipal liability will only be imposed under Ninth Circuit las "where the failure to train amounts to deliberate indifference to the rights of the person with whom the police come into contact." *Merritt*, 875 F.2d at 770. Under this standard, mere negligence in training is not enough to support a 1983 claim based on inadequate training or supervision. *Davis*, 869 F.2d at 1235. If fact, the Supreme Court in *City of Canton* held that a higher standard than gross negligence is required before a municipality may be held liable under 1983 for omissions in the training protocol. *Merritt*, 874 F.2d at 769. The Ninth Circuit has further explained:

> This heightened degree of culpability on the part of a Municipality may be established when the need for More or different training is so obvious and the inadequacy so likely to result in violation of Constitutional rights, that the policy makers of the City can be said to have been deliberately indifferent To the need. Id. At 770.

Upon examination of the evidence, the court finds there is nothing in plaintiff's Complaint indicating this heightened degree of culpability on the part of LVMPD. The court is limited to plaintiff's Complaint because plaintiff Geremia did not address this issue in his Opposition motion.

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19 Detective Ball testified in his deposition that this stalking training was similar to the techniques he used in investigating plaintiff Geremia's cases. See Defendant's Motion (#55), Ex. F,p.15(Deposition of Detective Ball)

The final issue before the court in determining whether a claim for inadequate training exists, is the requirement that the deliberate indifference on the part of the municipality actually caused the unconstitutional deprivation at issue. *Merritt,* 875 F.2d at 770. Once again, the court finds plaintiff's evidence does not demonstrate that LVMPD's alleged policy, practice, or custom deprived plaintiff of his constitutional rights.

In addition, plaintiff also alleges municipal liability under a policy of failing to supervise or disipline officers who allegedly file false charges to harass or intimidate the publis. See Amended Complaint, 29. Plaintiff, however, has not produced any evidence to demonstrate that LVMPD sanctioned such conduct so as to cause Detective Ball to allegedly file false charges against plaintiff.

In sum, it is clear there is no deliberate of callous indifference by LVMPD as it relates to training, supervision, or disciplining its officers. Moreover, plaintiff has not presented any genuine issues of material fact on these issues. Therefore, the court grants defendant's summary judgement motion on plaintiff's claims of inadequate training, supervision, and discipline.

D. Punitive Damages

1. 42 U.S.C. 1983

Plainitff seeks punitive damages under 42 U.S.C. 1983 against municipal defendants LVMPD and Detective Ball. The court. However, finds plaintiff's requested relief is contrary to established Supreme court precedent.

In *City of Newport v. Fact Concepts, Inc., 453 U.S. 247 (1981),* the Supreme Court ruled that 1983 plaintiffs may not recover punitive damages against a municipality. Although a municipality may be liable for compensatory damages in 1983 actions, it is immune from punitive damages under the statute. Id. (such immunity is comparible

with both the purposes of 1983 and general principles of public policy). Therefore, LVMPD, as a municipal defendant, is immune from punitive damages with respect to plaintiff's 1983 claim.

In addition, as the court recognized earlier, "a suit against a governmental officer in his official capacity is equivalent to a suit against the governmental entity itself." *Larenz, 946 F.2d at 646; see also Lewis,* 98 F.2d at 446. Accordingly, awarding punitive damages against an officer in

His official capacity is essentially an assessment against the municipal entity, which is immune from damages. For this reason, police officers sued in their capacities are also immune from punitive damages in a 1983 action. *Mitchell v. Dupnik,* 75 F.3d 517 (9th Cir. 1996). Thus, Detective Ball, inasmuch as he is sued in his official capacity, is immune from punitive damages for plaintiff's 1983 action.

2. Nevada State Law

LVMPD also moves for summary judgment dismissing plaintiff's jclaims for punitive damages under Nevada state law. Plaintiff seeks this particular form of damages with respect to his state law claims. Once again, the court finds plaintiff's requested relief is contrary to established precedent. In addition, plaintiff has also failed to address this argument within his Opposition motion, nor has he provided the Court with any evidentiary support.

Under NRS 41.035, Detective Ball and LVMPD cannot be held liable for any punitive damages arising out of plaintiff's non-federal claims. NRS 41.035 provides in pertinent part;

> (1) An award for damages in an action sounding in tort brought under NRS 41.031 or against a former or present officer or employee of the State or any political subdivision... arising out of an act or omission within the scope of his public duties or employment may not exceed The sum of $50,000, exclusive of interest computed from a date of judgment, to or for the benefit of any claimant. An award may not include any amount as exemplary or punitive damages. (emphasis added).

Accordingly, NRS 41.035 clearly limit's the award for damages in any tort action against the state, its political subdivision, or any employee thereof, to $50,000, exclusive of interest computed from the date of judgment. More importantly, NRS. 41.035(1) clearly states "[a]n award may not include any amount as exemplary or punitive damages." This provision has been upheld and enforced by the Nevada Supreme Court. *State v Eaton*, 101 Nev. 705, (1985); see also *Frank Briscoe v. County of Clark*, 643 F. Supp. 93)D. Nev. 1986). *aff'd*, 857 F.2d 606 (9th Cir. 1988), cert. Denied, 490 U.S. 1048 (1989). Therefore, as a matter of law, the court finds plaintiff's state law claims for punitive damages against Detective Ball and LVMPD are entirely precluded.

Conclusion

Defendant's Motion for Summary Judgment is granted because plaintiff has failed 1) to offer

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Evidence of a LVMPD policy, custom or practice which deprived plaintiff of his constitutional rights;2) to establish inadequate training and supervision by the LVMPD;and 3) to demonstrate he is entitled to punitive damages under federal or Nevada state law. Moreover, defendant has adequately demonstrated the absence of any genuine issues of material fact.

Accordingly, **IT IS ORDERED** that defendant's motion (#55) be GRANTED.

Dated; This 8th day of June, 1999.

David Hagan
United States District Judge

United States District Court
District Of Nevada
ORDER Entered and Served Dec. 8, 1999

Before the court is plaintiff's Motion for Reconsideration (#81). ***Defendants have not opposed*** And plaintiff has not replied. For the reasons stated below, the court denies plaintiff's motion. (emphasis added)

Analysis

A. Standard

A motion for reconsideration is entertained when the court is presented with (1) an intervening change in controlling law; (2) new evidence, and/or (3) the need to correct clear error or prevent manifest injustice. *School District No. 1J, Multnomah County Oregon v. AcandS, Inc.*, 5 F.3d 1255, 1263 (9th Cir. 1993); see 389 *Orange Street Partners v. Arnold, et al.*, 1999 WL 149915,

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*6(9th Cir. (Or.)(a motion for reconsideration should not be granted, absent highly unusual circumstances, unless the district court is presented with newly discovered evidence, committed clear error, or if there is an intervening change in controlling law) However, a motion for reconsideration is not properly brought, when it is simply to present arguments already considered by the court. *Ziegler v. Ziegler*, 28 F.Supp. 2d 601,621 (E.D. Wash. 1998) (*citing Backland v. Barnhart*, 778 F.2d 1386,1388(9th cir. 1985).

B. Plaintiff's Motion for Reconsideration

Without citing any statutory authority, plaintiff brings this motion for reconsideration of the court's Order(#78) which granted summary judgment to defendants on the issue of qualified immunity. A motion for

reconsideration is usually brought pursuant to Federal Rule of Civil Procedure 59(c), See, e.g.,*Ziegler,* 28 F.supp.2d at 621 (under the Federal Rules of Civil Propcedure, motions for reconsideration may be made pursuant to Rule 59(e). A motion brought pursuant to this rule, however, must be "filed no later than 10 days after entry of the judgment." See Fed. R.Civ.P. 59(e). In the instant case, plaintiff failed to file his motion within the requisite time frame. The court, nevertheless, will entertain this motion in light of plaintiff's *pro se* status. See *Haines v. Kerner,* 404 U.S. 419,520(1972).

After evaluating the arguments plaintiff has presented in support of his motion, the court cannot detect any new evidence or change in the controlling law that would require reconsideration of the court's order or justify a different ruling. At the same time, plaintiff has also failed to demonstrate any clear error in the court's decision. In essence, plaintiff's motion simply attempts to re-litigate all the same issues that have already been adjudicated. Therefore, following the Ninth Circuit's approach, plaintiff's Rule 59(e) motion is denied.

The court recognizes, however, that motions for reconsideration can also be brought pursuant to Federal Rule of Civil Procedure 60(b). This rule does not share the same constraints as Rule 59(e). See Fed.R.Civ.P. 60(b)("the motion shall be made within a reasonable time, and for reasons (1),(2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken."). Therefore, the court considers plaintiff's motion under this rule as well.

Federal rule of Civil Procedure 60(b) gives the court discretion to vacate an order when there is, for example,(1) a mistake, inadvertence, or excusable neglect; (2) newly discovered evidence introduced,and/or (3) any other reason justifying relief from the operation of the judgment.*1* *Fed.R.Civ.P. 60(b)(1),(2) & (3).* Given these considerations, the court nevertheless reaches the same conclusion as it did in its Rule 59(e) analysis. Plaintiff has not offered any evidence or relevant explanation the would require reconsideration of the court's order or justify a different ruling.

Conclusion

Accordingly, **IT IS ORDERED** that plaintiff's Motion for Reconsideration (#81) be DENIED.

DATED: This 8th day of December, 1999.

David Hagen
UNITED STATES DISTRICT JUDGE

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1 Rule 60(b) provides in pertinent part:

> On motion and upon such terms as are just, the Court may relieve a party or a party's legal Representative from a final judgment,order, or Proceeding for the following reasons;(1) Mistake, inadvertence,surprise, or excusable Neglect;(2) newly discovered evidence which By due diligence could not have been Discovered in time to move for a new trial Under Rule 59(b):...(6) any other reason Justifying relief from the operation of the Judgment.

United States District Court
District of Nevada
ORDER Entered and served
Dec. 8, 1999

Before this court is plaintiff's Motion for Reconsideration(#79). Defendants have opposed (#82) and plaintiff has not replied. For the reasons stated below, the court denies plaintiff's motion.

Analysis

A. Standard

A motion for reconsideration is entertained when the court is presented with (1) an intervening change in controlling law; (2) new evidence, and/or (3) the need to correct clear error or prevent manifest injustice. *School District No. 1J, Multnomah County Oregon v. AcandS, Inc.*, 5 F.3d 1255, 1263 (9th Cir. 1993); see 389 *Orange Street Partners v. Arnold, et al.*, 1999 WL 149915, *6(9th Cir. (Or.)(a motion for reconsideration should not be granted, absent highly unusual circumstances, unless the district court is presented with newly discovered evidence, committed clear

error, or if there is an intervening change in controlling law) However, a motion for reconsideration is not properly brought, when it is simply to present arguments already considered by the court. *Ziegler v. Ziegler*, 28 F.Supp. 2d 601,621 (E.D. Wash. 1998) (*citing Backland v. Barnhart*, 778 F.2d 1386,1388(9th cir. 1985).

B. Plaintiff's Motion for Reconsideration

Without citing any statutory authority, plaintiff brings this motion for reconsideration of the court's

Order(#78) which granted summary judgment to defendants on the issue of qualified immunity. A motion for reconsideration is usually brought pursuant to Federal Rule of Civil Procedure 59(c), See, e.g.,*Ziegler,* 28 F.supp.2d at 621 (under the Federal Rules of Civil Propcedure, motions for reconsideration may be made pursuant to Rule 59(e). A motion brought pursuant to this rule, however, must be "filed no later than 10 days after entry of the judgment." See Fed. R.Civ.P. 59(e). In the instant case, plaintiff failed to file his motion within the requisite time frame. The court, nevertheless, will entertain this motion in light of plaintiff's *pro se* status. See *Haines v. Kerner,* 404 U.S. 419,520(1972).

After evaluating the arguments plaintiff has presented in support of his motion, the court cannot detect any new evidence or change in the controlling law that would require reconsideration

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1 Without specifically invoking Federal Rule of Civil Procedure 56(f), plaintiff now contends defendants motion for summary judgment was premature because he has not had the opportunity to depose William and Joann Tullos. Plaintiff appears to argue their testimonies will result in additional evidence to support his claims.

The Ninth circuit, however, has recently explored the issue of summary judgment when the non-movant invokes Rule 56(f). See California v *Campbell, 138 F.3d 772(9th Cir.1997).* The Circuit held for a court to continue a summary judgment motion to permit further discovery, there must be the submission of a properly crafted affidavit. Id. More specifically, the California Court concluded the non-moving party must show:"(1) that they have set forth in affidavit form the specific facts that they hope to elicit from further discovery,(2) that the facts sought exist, and(3) that these sought-after facts are 'essential' to resist the summary judgment motion." Id. At 779.

Applying these factors to the instant case, the court finds plaintiff's motion is deficient in all three respects. Plaintiff does not provide an afficavit expressing what information he expects to elicit from these depositions, nor does he explain how these testimonies will demonstrate that LVMPD caused Detective Ball to violate his federal rights. Consequently, despite plaintiff's *pro se* status, his failure to submit an affidavit, properly crafted or otherwise, is an appropriate ground to denying his motion.

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of the court's order or justify a different ruling. At the same time, plaintiff has also failed to demonstrate any clear error in the court's decision. In essence, plaintiff's motion simply attempts to re-litigate all the same issues that have already been adjudicated. Therefore, following the Ninth Circuit's approach, plaintiff's Rule 59(e) motion is denied.

The court recognizes, however, that motions for reconsideration can also be brought pursuant to Federal Rule of Civil Procedure 60(b). This rule does not share the same constraints as Rule 59(e). See Fed.R.Civ.P. 60(b)("the motion shall be made within a reasonable time, and for reasons (1),(2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken."). Therefore, the court considers plaintiff's motion under this rule as well.

Federal Rule of Civil Procedure 60(b) gives the court discretion to vacate an order when there is, for example,(1) a mistake, inadvertence, or excusable neglect;(2) newly discovered evidence introduced;and/or(3) any other reason justifying relief from the operation of the judgment.2 *Fed.R.Civ.P. 60(b)(1),(2) & (6).* Given these considerations, the court nevertheless reaches the same conclusion as it did in its Rule 59(e) analysis. Plaintiff has not offered any evidence or relevant explanation that would require reconsideration of the court's order or justify a

different ruling.

Conclusion

Accordingly, **IT IS ORDERED** THAT PLAINTIFF'S MOTION FOR Reconsideration (#79) be DENIED.

DATED: This 8th day of December, 1999.

David Hagen
UNITED STATES DISTRICT JUDGE

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2 Rule 60(b) provides in pertinent part:

On motion and upon such terms as are just, the Court may relieve a party or a party's legal Representative from a final judgment,order, or Proceeding for the following reasons;(1) Mistake, inadvertence,surprise, or excusable Neglect;(2) newly discovered evidence which By due diligence could not have been Discovered in time to move for a new trial Under Rule 59(b):...(6) any other reason Justifying relief from the operation of the Judgment.

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA **ORDER**

Entered and served May 21, 1999

CV-S-97-01166-DWH(RLH)

Before the court is plaintiff's Motion (#61) to Compel Defendant Las Vegas Metropolitan Police Department ("LVMPD") to Produce Joan Tullos's One Page Statement.*1* Plaintiff claims this document is frequently referred to by defendants Detective Thomas Ball and LVMPD, yet plaintiff has been unable to obtain a copy.*2*

Plaintiff contends each time he refers to an exhibit which is supposed to be the one page

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1 This statement is dated July 5, 1995.

2 Plaintiff requests that defendant LVMPD produce the one page statement of Joann Tullos referred to as Exhibit "J" within Detective Ball's Motion (#56) for Summary Judgment. This statement is also referenced in Defendants' Response (#57) to Plaintiff's Motion to Deem Request for Admissions Admitted and Defendants' Federal Rule of Civil Procedure 26.1 documents.

Statement, all he finds is the following:

"Sworn Statement"

Under penalties of perjury, I swear or affirm that the information is true and that the applicant is in need of the requested Protective Order.

_____

Applicant

Plaintiff claims this document is signed by Joann and William Tullos, and is then notarized by Cam S. Stolenberg.

Plaintiff contends this is not the one page statement of Joann Tullos as alleged in defendants' documents. Plaintiff argues this is merely a verification of a statement. Therefore, plaintiff moves for an order to compel defendant LVMPD to actually produce Joann Tullos's one page statement.

Plaintiff claims if the document exists, he is being denied access. If the document does not exist, plaintiff request that sanctions be placed on defendants since much of their argument centers around "this alleged mystery statement of Joann Tullos." See Plaintiff's Motion to Compel(#61) at 3.

Defendant LVMPD, on the other hand, does not dispute the existence of Joann tullos's one page statement. In fact, defendant argues the "Sworn Statement" recited by plaintiff is actually Joann tullos's one page statement. Defendant contends the "document is entitled 'Sworn Statement' and is, therefore referred to by such name by defendants" See Defendant's Response (#65) at 2.

Analysis

Plaintiff contends defendant LVMPD has not disclosed Joann tullos's one page statement, despite the many references to this document in its pleadings. The court, however, after careful inspection of the alleged document and its application by defendants, does not draw the same conclusion.

Defendant LVMPD and Detective Ball have referenced this document on several occasions. Yet, in each instance, they have referred to this document as the "sworn statement of Joann tullos. One page in length, dated July 5, 19995." see, e.g., Defendant Detective Ball's Motion for Summary Judgment (#56) at 4, Defendants'

Response (#57) at 4. The court finds this accurately depicts the

Document that defendants claim to be Joann Tullos's one page statement. The document described by plaintiff uses the term "sworn statement," is one page in length, and is dated July 5, 1995. The plaintiff has not provided any further evidencee to the contrary.

Therefore, the court denies plaintiff's motion (#61) since plaintiff is already in possission of the document he seeks.

Conclusion

Accordingly, **IT IS ORDERED** that plaintiff's motion (#61) be DENIED.

DATED: This 19th day of May, 1999.

David Hagen

UNITED STATES DISTRICT COURT

Las Vegas Metropolitan Police Department

DECLARATION OF ARREST

True Name *Geremia, John David* Date of Arrest 09-12-95
Time of Arrest *1055*

Details for probable cause

On o9-12-95 at approx. 10.50 jars., I officer J. Larch #3826 contacted a subject known to me as Geremia, John David, DOB 01-20-50. Social Security #530-40-6707 at 3280 Mirador in Laughlin township, clark County, Nevada.
A warrant of arrest for Geremia was issued by Laughlin Justice court on 09-11-95 annd was confirmed by P#4467 at CCDC. Geremia was arrested and transported to the Laughlin Detention Facility without incident and booked for the warrant.

J. Larch #382
Declaring signature

Submitted: 7-19-95

NOTICE OF DENIAL OF REQUEST
CLARK COUNTY DISTRICT ATTORNEY

TO: DET. T. BALL

LVMPD-LAUGHLIN

DATE: 7/26/95

EV/DR/CIT#: 9507051023
DA FILE #: 95FL0431X

STATE vs.

GEREMIA, John David, #0160251

CHARGE: AGG STALKING

REASON FOR DENIAL
INSUFFICIENT EVIDENCE, HOWEVER, FLEASE RESUBMIT IF DEFENDANT VIOLATES THE PROTECTIVE ORDER IN ANY WAY.

DISTRICT ATTORNEY
BY: *Karen Van De Pol*
Deputy
DISTRIBUTION: Addressee D.A. Metro Records
Metro Jail

Arrested:
Submitted: 5/22/96

NOTICE OF DENIAL OF REQUEST
CLARK COUNTY DISTRICT ATTORNEY

TO: T. Ball, #364

DATE: 5/24/96

METRO RECORDS

EV/DR/CIT#: 9605141086
DA FILE #: 96ML1469X

STATE vs.
GEREMIA, JOHN DAVID #160251

CHARGE: HARASSMENT (2 Counts)

REASON FOR DENIAL

Lacks prosecutorial merit.

DISTRICT ATTORNEY
BY: BART PACE/vb
Deputy
DISTRIBUTION: Addressee D.A. Metro Jail

Arrested: 2/3/96
Submitted 2/8/96

REQUEST FOR ADDITIONAL INFORMATION

TO: METRO-T. BALL/LAUGHLIN
DATE; 2/9/96
YOUR DR#: 9602060865
DA FILE#: 96FL0039X

STATE vs.
GEREMIA, John David #0160251

CHARGE: VIOLATION TOP, AGGRAVATED STALKING

THE DISTRICT ATTORNEY

__ has approved issuance Criminal Complaint
X is considering issuance Criminal Complaint
PLEASE FURNISH FOLLOWING ADDITIONAL INFORMATION AND RETURN, TOGETHER WITH THIS SHEET, TO THE UNDERSIGNED:
WE NEED A CERTIFIED COPY OF THE PROTECTIVE ORDER
DISTRICT ATTORNEY
By: LYNN ROBINSON

Dated 6/8/99 ***filed with Court***

Letter from Defendants William and Joann Tullos

John David Geremia, Plaintiff
Vs.
Las Vegas Metropolitan Police Department et. Al.

COMES NOW Defendants, William and Joann tullos, In Proper Person, in response to a subpeona, dated 6/4/99, commanding us to appear at the Laughliin Library on 6/14/99 at 9am for the express purpose of giving depositions in this case. We, as defendants are requesting a rescheduling of this meeting. Due to family medical problems and possible interference with previously scheduled commitments, we would, we would request the meeting be scheduled for 7/26/99.

We would ask for the court's indulgence in this matter and sincerely hope the proposed date does not interfere with anyone else's schedules, plans or commitments.

Also, we would submit that since this subpeona was not filed until 6/4/99, mailed to us on 6/5/99, and received by us until 6/8/99, this does not permit a reasonable amount of time to make arrangements and also does not allow a 15 day notice we believed to be the minimum required by law.

Dated 7/21/99 ***FILED WITH COURT***

Letter from Defendants William and Joann Tullos

John David Geremia, Plaintiff
Vs.
Las Vegas Metropolitan Police Department et. Al.

COMES NOW Defendants, William and Joann tullos, In Proper Person; in response to a subpeona from John Geremia; Plaintiff, dated 6/14/99, commanding us to appear for the express purpose of giving depositions in this case at the Laughlin Library on 8/9/99. We, as defendants, are requesting a rescheduling of this meeting. Due to previously scheduled medical appointment which can not be rescheduled, we request the depositions be reset for Thursday 8-26-99.

We respectfully seek your indulgence in this lmatter and sincerely hope the proposed date does not interfere with anyone else's previous plans schedules or commitments. Thank you in advance for your cooperation.

Sworn trial testimony Joann Tullos

don't have the education.

MR. POTTER: Alright. So you relied upon him, the two of you....

MRS. TULLOS: I can read it, though. I've got common sense and a little reading.

MR. POTTER: Alright. I understand that. You made a statement, you read it, and you witnessed it, and he signed it, correct?

MRS. TULLOS: Yes, sir.

MR. POTTER: Your daughters weren't there at the time?

MRS. TULLOS: I brought them in, yes, sir. They each came in and made their statements.

MR. POTTER: Did they make a written statement?

MRS. TULLOS: The lady took, what you call a written statement, yeah, the lady wrote it out for them, but she took each one of them, talked to them, and wrote them out at the police station.

MR. POTTER: And hand wrote them out?

MRS. TULLOS: No, she done it on a computer.

MR> POTTER: Alright. And when was that?

MRS. TULLOS: I don't think, I don't think she hand, I didn't see her handwriting. I don't know. I don't remember, I I know that each one of them gave a statement.

MR. POTTER: Alright. How long ago after you gave your statement, how much time expired?

MRS. TULLOS: It was the same day.

Sworn trial testimony Keshia Tullos

KESHIA TULLOS: It was May.

MR. BERRETT: May of '95?

KESHIA TULLOS: Mm-hm.

MR. BERRETT: Is that a yes?

KESHIA TULLOS: Yes, sir.

MR. BERRETT: Alright. Anything else?

KESHIA TULLOS: No, sir.

MR. BERRETT: Alright, we'll pass the witness.

THE COURT: Mr. Potter.

MR. POTTER: Keshia, did you ever come down to the police and make a statement?

KESHIA TULLOS: Yes, sir, I did.

MR. POTTER: Alright, and do you remember how they took down the statement? Did you write it out or was it...

KESHIA TULLOS: I think we wrote it out, and we signed it.

MR. POTTER: Okay. And do you know who you wrote it out to? Did the individual who took your statement, did they give you a name?

EX. 13 PG. 2

KESHIA TULLOS: They had a name, but I'm not sure. I don't, I'm not sure about their name that took it.

MR. POTTER: Dan you describe the person who took the statement from you?

KESHIA TULLOS: I don't know; there's some lady in the other building.

MR. POTTER: Alright.

KESHIA TULLOS: That's all I know.

MR. POTTER: Your Honor, at this time, pursuant to the Brady and Guglio (ph), United States Supreme court cases, I would ask that those statements be produced. I have not received those in the discovery. We've had two witnesses testify that, if fact, the mother and the child, now, that they made statements to this woman. We're, under the law, entitled to those statements, and I have not been, received those statements or they have not been produced to me.

THE COURT: Mr. Berrett.

MR. BERRETT: I don't have them, Judge; I don't know that they exist. Do you physically write down a statement?

KESHIA TULLOS: I think my mom wrote it out, and then we wrote our part to it, and then we signed it.

MR. BERRETT: If they exist, I mean, they, they'd have to ask the police department. To get them. I don't have them.

EX. 13 PG. 3

THE COURT: There's nothing in the record record that I can find. In the file here that would indicate any written statements.

MR. BERRETT: I know it's ten minutes to five; if Mr. Potter wants to walk over and grab the detective and see if there's something more in the file, that's fine with me. I don't mind…

THE COURT: Mr. Potter?

MR. POTTER: Your honor, to properly and constitutionally cross examine this witness if she's made statements, I need the statements. That's, that would be my request then. Is to have those statements produced.

THE COURT: Okay. It's a fair request, it's almost 5:00. Let's see if we can obtain those statements and continue this. What's your schedule? We have a stacked (unt).

MR. POTTER: My problem, Judge, is I'm suppose to be in Carson City tomorrow. Previously scheduled depositions with the State. If we're going to continue it, I would ask that we continue it for another time.

THE COURT: Let's see if we can get the statements, see it there's any record of those statements before 5:00. And go

from there. We'll take a seven, eight minute break here and then continue.

THE COURT: Okay, now go ahead, Mr. Potter.

MR. POTTER: Your Honor, my argument is (unt) motion be dismissed based upon the destruction of or failure to

EX. 13 PG. 4

produce and arguable destruction of exculpatory evidence under Brady and Guglio. What you have is the mother and the child both saying that they made these written statements. The mother has testified and confirmed with Mr. Berrett and myself out in the hallway that she brought these statements of these two girls back to the police department, (unt) officer simply (unt) police department, who is the custodian of records saying that she has the record here and it does not have the statements in it. And not to speak for her, but my understanding is, it's her recollection that there was some records brought in from the school at the time the initial statements were made, but her recollection is the statements were brought in.

THE COURT: Mr. Berritt.

MR. BERRETT: Judge, a motion to dismiss is not well founded. We've, you know, there's nothing to show there's anything exculpatory. All we know is that the mother says she thought she may have brought statements back, which are not now in the custody of the police. That's not a reason for anything. I mean, it's probably consistent with what they testified anyway and they're telling them the best they recall. There's not any liegal grounds for that motion.

MR. POTTER: There is legal grounds, and he can't make

that opposition in good faith because he knows what the law is, and they have an obligation to preserve statements. As I pointed out to this Court when we first started here, (unt) case whether or not the victim's statements; for whatever reasons when they charged this case, they didn't have the victim's statements. JThere's two different victims in this case. They have a statement that's produced in discovery that is actually written out by the father and witnessed by the mother, but there were no statements. I'm at a loss to even fathom how they make a charge here. And that's the reason we brought on the motion to dismiss initially on the complaint. If you don't have witness statements, how can you charge a crime? I mean, what factual basis do you have to charge this crime? And if they're saying we

Sworn trial testimony of Krystal Tullos.

KRYSTAL TULLOS: Yes, sir.

MR. POTTER: Do you recall whether you wrote the statement out?

KRYSTAL TULLOS: No, this lady, she was typing on the computer, and we just told her everything.

MR. POTTER: Alright. And did you ever see a copy of what you told her what she was typing?

KRYSTAL TULLOS: Once.

MR. POTTER: Alright, where did you see it at?

KRYSTAL TULLOS: She had printed it up.

MR. POTTER: Alright, did she show it to you? Do you know who the lady was that showed you this statement?

KRYSTAL TULLOS: Huh?

MR. POTTER: Do you know who the lady was that s

howed you this statement?

KRYSTAL TULLOS: I'm not sure of her name. She just worked (unt) offices.

MR. POTTER: I'm sorry?

KRYSTAL TULLOS: I'm not sure of her name. I just

know she worked in the offices.

MR. POTTER: She was one of the police officers or was one of the police officers?

KRYSTAL TULLOS: She was, worked in the office.

MR. POTTER: down here in this building?

KRYSTAL TULLOS; Yes.

MR. POTTER: This police station (unt) the courthouse right?

KRYSTAL TULLOS: Yes.

MR. POTTER: And did you come from school to make that statement?

KRYSTAL TULLOS: Yes, sir, it was right after school.

MR. POTTER: Okay. Have you ever been in a situation where you've seen Mr. Geremia have somebody give him the middle finger? Have you ever seen somebody that you were with or a friend or....

KRYSTAL TULLOS: No, sir.

MR. POTTER: I don't think I have any other questions of this witness.

THE COURT: Mr. Berrett.

MR. BERRETT: Thank you, Krystal, do you think you

would remember what the statement looked like after this lady typed it in and gave you a copy to look at?

KRYSTAL TULLOS: (UNT) EVERYTHING. What we had…

MR. BERRETT: showed you (unt) report is a three page police report. Is that what you're referring to tha tshe typed it out and then you reviewed?

MR. POTTER: I'm going to object to the leading nature of the question. She's testified about some statements, now he's giving her a police report.

MR. BERRETT: She didn't say she reviewed a statement: she said she gave a statement to the officer…

MR. POTTER: And she reviewed it on the computer screen.

MR. BERRETT: …(unt) and then when it came out, she looked at it. I want to ask what she looked at.

KRYSTAL TULLOS: Yes, sir. (unt) similar to this.

MR. BERRETT: Alright. Do you know if that is a copy of something you looked at or was it something that had your name on an entire page of information that you (unt), signed?

KRYSTAL TULLOS: It's, (unt), looked like.

MR. BERRETT: This is what it looked like? Alright. For the record, I've, I haven't got it marked, but it is a copy of

the three page police reprt of which is attached as Exhibit #2, I think.

THE CLERK: 2A

MR. BERRETT: 2a. Thank you, no more questions.

MR. POTTER: So there's no questions what we're looking at here. (unt) what wasn't marked, but it's a three page statement. You're testifying that it's similar terms of what (unt) computer report, you don't know if the content is the same, do you?

KRYSTAL TULLOS: Yes, sir. It's, there are parts in there that is the same.

MR. POTTER: Parts of it is same.

KRYSTAL TULLOS: Yes. Yes, all of this (unt), (unt).

SWORN STATEMENT

Under the penalties of perjury, I swear or affirm that the information is true and that the applicant is in need of the requested Protective Order.

Joann Tullos
Applicant

SIGNED AND SWORN TO OR AFFIRMED
Before me this 5th day of July, 1995.

Cam S. Stoltenberg
NOTARY PUBLIC/ DEPUTY CLERK

Supreme Court, U.S.
FILED
SEP 17 2003
OFFICE OF THE CLERK

No. 03-264

In The
Supreme Court of the United States

JOHN DAVID GEREMIA,

Petitioner,

v.

LAS VEGAS METROPOLITAN POLICE DEPARTMENT, DETECTIVE T. BALL; WILLIAM TULLOS; JOANN TULLOS and WILLIAM MOMA,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONDENTS LAS VEGAS METROPOLITAN POLICE DEPARTMENT AND DETECTIVE BALL'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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29 pp

ISSUES PRESENTED FOR REVIEW

1. Whether the Ninth Circuit properly held the actions of an independent entity – either a judge or a district attorney – in issuing warrants or filing criminal complaints insulated Det. Ball in his official and individual capacity from liability under 42 U.S.C. §1983?

2. Whether the Ninth Circuit properly sustained the decision to deny Petitioner's demand for discovery due to its lack of factual support?

3. Whether the only matter properly before the Ninth Circuit Court of Appeals was the denial of the Motion for Reconsideration?

4. Whether Petitioner's Motions for Reconsideration were properly denied?

PARTIES TO THE PROCEEDING

The case caption contains all the known parties to the proceeding.

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CITATION OF OPINION

Appellant's Appendix contains the relevant decision of the Ninth Circuit Court of Appeals entered September 16, 2002 and the appropriate decision of Judge Hagen for this Court to review to determine whether a Writ of Certiorari should issue in this case.

JURISDICTION

On September 16, 2002, the Ninth Circuit Court of Appeals entered an opinion affirming Judge Hagen's decision dismissing this case by summary judgment and denying Petitioner's Motion for Reconsideration. Thereafter, Petitioner timely sought a rehearing en banc by the Ninth Circuit of that decision. Having been so advised, the Ninth Circuit ultimately decided – on March 4, 2003 – to decline the request to reconsider the decision.

Thereafter, Petitioner attempted to bring this matter before this Honorable Court. On August 20, 2003 that matter was docketed with this Court. That date is beyond the requisite 90-day period and, therefore, jurisdiction may not vest. Accordingly, this Petition may be in violation of the time parameters set forth in Supreme Court Rule 13.1. However, it is possible this Court extended the time for filing due to Petitioner's inability to properly format the brief which was before this Court. If an order issued under Supreme Court Rule 13.5, then this concern would be allayed. Otherwise, it would appear the instant Petition is jurisdictionally out of time.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The only constitutional provision at issue in this Petition is the Fourth Amendment which reads:

> The right of the people to be secure in their persons, houses, papers, and affects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF THE CASE

It is respectfully submitted this matter is not one which warrants the consideration or intervention of this Honorable Court. Rather, certiorari should be denied and the Ninth Circuit's decision should be sustained. There are no material errors of law in the Ninth Circuit's decision. Instead, it is a proper and cogent recognition of applicable jurisprudence in this area – in light of established facts.

Pursuant to Supreme Court Rule 14.1(g)(ii) jurisdiction before the Ninth Circuit came from a challenge to the denial of Petitioner's Motion for Reconsideration. After District Court Judge Hagen dismissed the litigation granting summary judgment on two separate motions on June 10th and June 28th, 1999, Petitioner sought reconsideration in the form of two separately filed motions; one filed 21 days after the June 10th Order had been entered and the other 18 days following the June 28th Order.

In declining to reconsider the issue, Judge Hagen noted both of the Motions were brought outside the 10-day

limit. The Judge's Order as to the Motions for Reconsideration being late-filed and his denial of same was entered December 8, 1999. No Notice of Appeal was filed in the case until December 30, 1999.

Pursuant to Federal Rule of Appellate Procedure 4(a)(1)(A), the Notice of Appeal must be filed with the District Court Clerk within 30 days after the entry of the judgment or order being appealed. If a *timely motion* is filed under Rule 59, then Federal Rule of Appellate Procedure 4(a)(4)(A) tolls the time for the appeal to run. Since the Motions were filed beyond the 10-day limit, the two June decisions could not fall within the ambit of the Ninth Circuit appeal. Instead, the only matter to be properly appealed was the decision by the Judge to deny the Motions for Reconsideration.

That fact notwithstanding, the following is a brief explication of the relevant facts in this case established by the record on appeal.

STATEMENT OF FACTS

The circumstances which allegedly give rise to Petitioner's litigation have their genesis in citizen's complaints and statements made to the LVMPD Laughlin Substation in early June of 1995. These involved a series of actions by Petitioner over a period of time designed to intimidate other individuals. In addition, Detective Ball received a copy of a Protective Order dated July 5, 1995, signed by Judge Moma from Justice Court in Clark County, Nevada. Attached to the Protective Order were instructions to the Sheriff regarding said Protective Order. On that same day,

Detective Ball received a sworn statement from Joann Tullos.

These statements were uniform in their concern about the activities of Petitioner and strongly suggested criminal activity. Upon receipt of these statements, after investigating the matter, Detective Ball prepared a package for reference to the District Attorney's office regarding potential criminal prosecution. On or about July 26, 1995, the District Attorney's office informed Detective Ball the request was denied. On July 28, 1995, Detective Ball cleared and closed the case without any further action.

Afterwards, without consulting Detective Ball (and without any involvement on his behalf) the District Attorney's office filed criminal charges against Petitioner for misdemeanor stalking. An Arrest Warrant was submitted to Judge Moma, signed, and Petitioner was arrested on September 12, 1995.

After his trial on November 30, 1995, Petitioner was convicted on a misdemeanor charge of stalking. On appeal, the conviction was overturned. While it was reset for trial on multiple occasions, the District Attorney's office eventually dismissed the case on its own motion.

During this period of time, the parties who felt they were being threatened by Petitioner continued to submit reports to LVMPD regarding additional events and alleged violations of the Protective Order. The materials were put together and resubmitted to the District Attorney's office; a return request was received from that office for a certified copy of the Protective Order before consideration would be given about going forward on those charges. Upon receipt of the information, on March 14, 1996, the District Attorney's office again submitted a Warrant of

Arrest to Judge Moma which was signed by him. On that same day, Petitioner was arrested on that Warrant and transported to Laughlin, Nevada where he stayed in the detention facility. Even before the Arrest Warrant was submitted, another criminal Complaint was filed by the District Attorney's office. The Complaint was signed by Deputy District Attorney Lynn Robinson. It was ultimately dismissed with prejudice on February 27, 1997.

In April of 1996, Petitioner was involved in a confrontation with coaches of a softball team of which his daughter was a member. As a result, additional complaints and statements were provided to LVMPD regarding that event. Two of the Complaints were sworn statements against Petitioner for harassment. There was also an Incident Report prepared on May 14, 1996, listing Beverly Frietas and Lisa Marie Hackney as victims. This matter was packaged and submitted to the District Attorney's office for consideration. In addition, the District Attorney's office received an Order for Protection issued by the Justice Court on May 14, 1996 on behalf of Ms. Frietas and Ms. Hackney. On May 24, 1996, the District Attorney's office denied prosecution of the matter stating it lacked prosecutorial merit. Detective Ball again closed out his file on July 17, 1996.

Each time the matter became one which was the subject of a Criminal Complaint, Detective Ball was unaware of such decisions. Detective Ball's only involvement was the receipt and submission of these concerns to the District Attorney's office. The decision to prosecute was independently made by the District Attorney's office. It was their choice to seek arrest warrants and they were the sole preparers and signators of the criminal Complaints. In fact, the only way Detective Ball became aware of the

intent to prosecute by the District Attorney's office was when he was confronted by Petitioner's spouse at the substation.

These facts, substantiated by valid evidence, formed the basis for the District Court to grant summary judgment. They were also, apparently, relied upon by the Ninth Circuit in sustaining the decision of Judge Hagen. On this Petition, it is respectfully submitted a different result should not be obtained.

LEGAL ANALYSIS

I. SUMMARY JUDGMENT WAS PROPERLY GRANTED AS TO DETECTIVE BALL IN HIS INDIVIDUAL AND OFFICIAL CAPACITY

A. THERE WAS NO BASIS FOR OFFICIAL CAPACITY LIABILITY

Assuming arguendo this Honorable Court wishes to examine in greater detail the actions of LVMPD and Detective Ball – in the context of the original granting of the Motions for Summary Judgment – Respondents submit Judge Hagen was still correct in the actions which he undertook. An official capacity suit requires a deprivation come directly from a plan or policy of the state, municipality or political subdivision. *Jones v. Smith*, 784 F.2d 149, 152 (2nd Cir. 1986). It is viable only when the underlying governmental entity is the moving force behind the constitutional deprivation. *Kentucky v. Graham*, 473 U.S. 159, 166 (1985). In other words, the governmental entity's "policy or custom" must have "caused" the violation of federal law or rights. *Oklahoma City v. Tuttle*, 471 U.S. 808 (1985).

It cannot be gainsaid there is *no* liability under §1983 based on respondeat superior or vicarious liability. *Monell v. Dept. of Social Servs.*, 436 U.S. 658, 691 (1978). "It is only when 'execution of the government's policy or custom . . . inflicts the injury' that the municipality may be held liable under §1983." *City of Canton v. Harris*, 489 U.S. 378, 385 (1989). Therefore, the first inquiry in any case which alleges municipal liability under §1983 is whether a direct causal link exists between a municipal policy or custom and the alleged constitutional deprivation. *Id.*

The task of establishing municipal liability is not an easy one. The policy or custom must be a deliberate or conscious choice by a municipality's final policy-making official. *Pembaur v. City of Cincinnati*, 475 U.S. 469, 483 (1986) (plurality opinion). "While the municipality's failure to adopt a precaution can be the basis for §1983 liability, such omission must amount to an intentional choice, not merely an unintentionally negligent oversight." *Rhyne v. Henderson County*, 973 F.2d 386, 392 (5th Cir. 1992). However, the failure of a municipality to adopt a policy cannot constitute an intentional choice unless it can be said the city was "deliberately indifferent." *City of Canton*, 489 U.S. at 390. This deliberate indifference is found only when it is obvious the likely consequences of not adopting a policy will be a deprivation of constitutional rights. *Id.*

Ordinarily, inadequate training alone is not the moving force of injury because the police officer who "causes" the injury does not rely upon inadequate training as tacit approval of his conduct. *Palmer v. City of Antonio*, 810 F.2d 514, 516 (5th Cir. 1987). In addition, merely proving an isolated incident is insufficient to show that a custom exists. "Isolated violations are not persistent, often repeated, constant violations that constitute custom and

policy." *Bennett v. City of Slidell*, 728 F.2d 762, 768 n.3 (5th Cir. 1984) (en banc), *cert. denied*, 472 U.S. 1016 (1985). Conclusory allegations of grossly inadequate training do not make out a case of a deliberately indifferent policy. In order to be a policy, inadequate training must be the product of conscious choice. *Oklahoma City*, 471 U.S. at 824 n.7.

The focus must be on the adequacy of the training program in relation to the task the particular officers must perform. "That a particular officer may be unsatisfactorily trained will not alone suffice to fasten liability on the city, for the officer's shortcomings may have resulted from factors other than a faulty training program." *City of Canton*, 489 U.S. at 390-91.

> It may be, for example, that an otherwise sound program has occasionally been negligently administered. Neither will it suffice to prove that an injury or accident could have been avoided if an officer had had better or more training, sufficient to equip him to avoid the particular injury causing conduct. Such a claim could be made about almost any encounter resulting in injury, yet not condemn the adequacy of the program to enable officers to respond properly to the usual and recurring situations with which they must deal. And plainly, adequately trained officers occasionally make mistakes; the fact that they do says little about the training program or the legal basis for holding the city liable.

489 U.S. at 391. In other words, one must query whether the injury would have definitely been avoided had the employee been trained under a program that was not deficient in the identified respect. *Id.*

In this case, no evidence presented to Judge Hagen indicated proof of any official plan, policy, custom or scheme which could, in any way, constitute a moving force behind any alleged constitutional violation. There was simply no evidence presented of inadequate supervision or training of Detective Ball. In fact, the evidence clearly indicates any prosecution of Petitioner was done based on third-party statements (which were not solicited by Detective Ball) which resulted in an independent decision by the District Attorney's office to prosecute. None of these events rose to the level of a constitutional violation.

Even if an underlying constitutional violation could be shown, that fact alone fails to create a basis for municipal liability. At best, Petitioner's arguments establish an isolated event which is, as a matter of law, insufficient to establish an official capacity claim. The evidence revealed Detective Ball took reasonable steps throughout each stage of his investigations; he collected the relevant evidence presented to him; he determined probable cause existed; and then he turned his investigation over to the Clark County District Attorney's office for further review.

Petitioner was further unable to establish any evidence of inadequate training, supervision or discipline. In fact, Detective Ball specifically testified he had extensive training in stalking cases. When stalking became a nationally recognized crime, LVMPD offered even more extensive classes and provided the officers with regular updates when there were changes in the relevant laws. *Id.* Accordingly, there is simply no evidence upon which to establish a claim for inadequate training or supervision.

Finally, Judge Hagen properly held punitive damages could not be raised against a municipal defendant such as

LVMPD or Detective Ball (in his official capacity). *See City of Newport v. Fact Concepts, Inc.*, 453 U.S. 247 (1981). This prohibition against punitive damages exists not only as to the federal claim but also in the state claims. *See* N.R.S. 41.035. Therefore, Judge Hagen properly held no official capacity claim existed in this case and that punitive damages, as a matter of law, should be dismissed against LVMPD in the 42 U.S.C. §1983 setting and against both Detective Ball and LVMPD in the state law claims.

B. THERE IS NO BASIS FOR INDIVIDUAL CAPACITY LIABILITY

On June 30, 1999, Judge Hagen disposed of the individual capacity claims against Detective Ball. This decision was absolutely correct. There were no valid grounds for individual capacity liability. That result should not change.

In this case, Judge Hagen determined Detective Ball was entitled to qualified immunity. Qualified immunity provides officers with an additional layer of protection against civil liability. *Anderson v. Creighton*, 483 U.S. 635 (1987). It is available to government officials if they could reasonably have thought their acts were lawful in light of clearly established law and the information they possessed. *Kennedy v. Los Angeles Police Dept.*, 901 F.2d 702, 706 (9th Cir. 1989). Officials will be immune unless "the law clearly proscribed the actions" which they performed. *Mitchell v. Forsyth*, 472 U.S. 511, 528 (1985). Qualified immunity is designed to protect "all but the plainly incompetent or those who knowingly violate the law." *Malley v. Briggs*, 475 U.S. 335, 344-45 (1986).

Developed to protect public employees from suits and individual liability in the discharge of their public duties, it was designed as a compromise "struck across the board because of the 'substantial social costs, including the risk that fear of personal monetary liability and harassing will unduly inhibit officials in the discharge of their duties.'" *Anderson*, 483 U.S. at 638 (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 102 S. Ct. 2727 (1982)). Wholly *objective* in nature, this test is not dependent upon subjective intent. *Kentucky*, 473 U.S. at 166-67; *Kirkpatrick v. City of Los Angeles*, 803 F.2d 485, 490 (9th Cir. 1986).

In determining whether qualified immunity applies in the present case, *Romero v. Kitsap County,* 931 F.2d 624, 627 (9th Cir. 1991) provides the test:

> The qualified immunity test necessitates three inquiries: (1) the identification of the specific right allegedly violated; (2) the determination of whether that right was so "clearly established" as to alert a reasonable officer of his constitutional parameters; and (3) the ultimate determination of whether a reasonable officer could have believed lawful the particular conduct at issue.

Applying this test to the present case, Detective Ball was entitled to qualified immunity.

Petitioner attempted to identify two rights which were allegedly violated by Detective Ball. First, he argued his Fourth Amendment rights against unreasonable seizures were violated and he claimed a "right" to a full police investigation. The latter claim, as noted by the Judge, was not a recognized right under the Constitution nor was it considered a viable cause of action. Judge Hagen properly held the more amorphous claim of the right to a "full

investigation" – because it was not fully explicated – was not a clearly established right.[1] Thus, to the extent a "failure to fully investigate" claim existed, Judge Hagen properly held Detective Ball was entitled to qualified immunity.

The last remaining issue was whether a reasonable officer would have believed the particular conduct at issue was lawful. Detective Ball made three separate submissions based on the independent reports of third parties who felt they had been personally harassed by Petitioner. Detective Ball's referral to the District Attorney's office for these cases was predicated on the fact that he believed probable cause existed.

"Probable cause exists if the facts and circumstances known to the officers the moment of the arrest would warrant a prudent man in believing that a felony had been committed by the person arrested." *Gordon v. State*, 67 Nev. 177, 426 P.2d 424, 425 (1967); *see Wyatt v. State*, 86 Nev. 294, 468 P.2d 338, 341 (1970) (citing *Draper v. United States*, 358 U.S. 307, 313 (1959)).

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[1] This Court, in *Baker v. McCollan*, 443 U.S. 137, 145-46 (1979), refused to impose a constitutional duty on an officer to engage in a thorough investigation of every suspect who asserts innocence. *See also Thompson v. Olson*, 798 F.2d 552, 556 (1st Cir.), *cert. denied*, 480 U.S. 908 (1987). The Seventh Circuit noted while good police practice may require interviews of all available witnesses, "the Constitution does not require police to follow the best recommended practices." *Gramenos v. Jewel Companies, Inc.*, 797 F.2d 432, 442 (7th Cir. 1986). At best, Petitioner argued for a negligent investigation which, as Judge Hagen properly noted, fails to rise to the level of a constitutional claim. *See Daniel v. Williams*, 474 U.S. 327 (1986); *Romero v. Stover*, 45 F.3d 1472, 1478 (10th Cir. 1995); *Herrera v. Millsap*, 862 F.2d 1157, 1160 (5th Cir. 1989).

> A police officer has immunity if he arrests with probable cause. As Chief Justice Warren put it, "A policeman's lot is not so unhappy that he must choose between dereliction of his duty if he does not arrest when he has probable cause, and being mulcted in damages if he does." The immunity in performing such a discretionary function as arresting or detaining a suspect is established by an objective standard, not by an examination of the subjective state of mind of the officer.

Hutchinson v. Grant, 796 F.2d 288, 290 (9th Cir. 1986) (citations omitted). The requirement is not one of absolute certainty but rather a fair probability that the arrestee had committed the crime. *United States v. Potter*, 895 F.2d 1231, 1233-34 (9th Cir.), *cert. denied*, 497 U.S. 1008 (1990). In determining whether probable cause exists, law enforcement officers may draw upon their expertise and experience. *United States v. Hoyos*, 892 F.2d 1387, 1392 (9th Cir. 1989).

Even seemingly innocent conduct may provide the basis for probable cause when viewed in light of all the information known at the time of the seizure. *United States v. Rodriguez*, 869 F.2d 479, 483 (9th Cir. 1989). *See also United States v. Milner*, 962 F.2d 908 (9th Cir. 1992) (the experience, special training, and expertise of the officers may be considered in determining the existence of probable cause). Prior arrests and convictions can help to establish probable cause, especially where the previous arrest or conviction involves a crime of the same general nature. *See United States v. Conley*, 4 F.3d 1200, 1207 (3rd Cir. 1993), *cert. denied*, 510 U.S. 1177 (1994). The duty of the Court, faced with certain facts, is to determine whether the facts available to the officer at the moment of the arrest would establish such probable cause. *Pendergrast v. United*

States, 416 F.2d 776, 783-84 (D.C. Cir. 1969). In this case, as to each arrest, Judge Hagen held the actions of Detective Ball were appropriate.

The statements by independent witnesses who claimed to be victims or witnesses were sufficient to establish a reasonable person's belief that a crime may well have been in the process of being committed and that Petitioner may have been the instigator of such a crime. While Petitioner may ultimately disagree with the truthfulness of those statements or the dispassionate interest of the witnesses, that disagreement alone is insufficient to destroy probable cause.

More importantly, *Smiddy v. Varney*, 665 F.2d 261, 266-67 (9th Cir. 1981), played an important role in this case, holding the independent decision by the District Attorney's office to file a criminal complaint was considered an intervening act sufficient to immunize both the police officers and the Department from liability.

> Filing of a criminal complaint immunized investigating officers such as the appellants from damages suffered thereafter because it is presumed that the prosecutor filing the complaint exercised independent judgment in determining the probable cause for an accused's arrest exists at that time. . . . Thus, we hold that where police officers do not act maliciously or with reckless disregard for the rights of an arrested person, they are not liable for damages suffered by the person after a district attorney files charges unless the presumption of independent judgment by the district attorney is rebutted . . . a police officer's lot is already unfortunate because it is he who often is the only actor in a chain of decisions

> leading to prosecution who is subject to §1983 liability. We need not make it more unfortunate by holding the officer liable for damages that is the result of the intervening fault of others in the chain.

See Barts v. Joyner, 865 F.2d 1187 (11th Cir. 1989); *Ames v. United States*, 600 F.2d 183 (8th Cir. 1979); *Dellums v. Powell*, 566 F.2d 167 (D.C. Cir. 1977); *Rodriguez v. Ritchey*, 556 F.2d 1185 (5th Cir. 1977). This intervening act further insulated Detective Ball from liability and, therefore, summary judgment was appropriate.

The only remaining cause of action in this regard was the characterization of these events as a state law malicious prosecution. Normally, malicious prosecution claims are not cognizable under §1983 if process is available within the state judicial system to provide a remedy. *Usher v. City of Los Angeles*, 828 F.2d 556, 561 (9th Cir. 1987). Before the court may decide whether a prosecution was conducted with the intent to deprive an individual of his constitutional rights, however, it must first decide whether such a claim has been established under the applicable state law. In Nevada, the prima facie elements of the tort of malicious prosecution are: (1) want of probable cause to initiate the prior criminal proceeding; (2) malice; (3) favorable termination of the litigation; and (4) resulting damage. *See Chapman v. City of Reno*, 85 Nev. 365, 369, 455 P.2d 618, 620 (1969). In this case, probable cause clearly existed. Therefore, the tort for a malicious prosecution claim would automatically fold. More importantly, there was no evidence of malice on the part of Detective Ball or LVMPD. Instead, the evidence reflects Detective Ball took reasonable steps to collect the evidence and determine probable cause existed before he turned the matter over for further review to the Clark County District

Attorney's office. Based on these facts and the relevant law, there is no question that Detective Ball was entitled to judgment in his favor.[2]

II. PETITIONER NEVER ESTABLISHED PROPER GROUNDS TO REFUSE SUMMARY JUDGMENT UNDER FRCP 56(f)

Petitioner asserts he needed additional discovery. Indeed, most of his issues presented for review submitted to this Court deal with the issue of discovery. However, while Petitioner informed the District Court Judge and the Ninth Circuit he felt he was entitled to additional discovery, the record was clear Petitioner did *nothing* during the discovery period to identify experts or to conduct any discovery. Furthermore, he provided no affidavit and submitted no evidence which would support a decision to withhold summary judgment on the grounds of FRCP 56(f).

While Rule 56(f) is designed to ensure a party has an opportunity to prove his case, where sufficient time for discovery or discovery itself has been allowed for a plaintiff to substantiate his claims, a mere argument that no facts presently exist has been held to be insufficient. *See First Nat'l Bank of Arizona v. City's Service Co.*, 391 U.S. 253, 88 S. Ct. 1575 (1968). More importantly, courts have

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[2] Judge Hagen also noted Petitioner claimed he was entitled to additional discovery. However, the discovery cut-off had already passed. Appellant did nothing to identify experts or to conduct additional discovery. Moreover, he did not meet the requirements of F.R.C.P. 56(f) in making such a request and, therefore, the Judge correctly denied this aspect of his Opposition.

held the party opposing summary judgment must show (1) what facts are involved, (2) why they are known exclusively to the other party, and (3) what steps have been taken to access them. *See Channel Master Satellite Sys., Inc. v. JFD Electronics Corp.*, 748 F. Supp. 373, 395 (D.N.C. 1990). Subsection (f) is not a shield that can be raised to block summary judgment without some showing the opposing party's position is meritorious. *Bakerrink v. Orthopedic Assocs.*, 94 Nev. 428, 431, 581 P.2d 9 (1978).

The court should only permit discovery if it appears from the *affidavits* filed the party opposing the summary judgment could not, for reasons stated, present facts essential to justify the opposition. *Volk v. D.A. Davidson & Co.*, 816 F.2d 1406, 1416 (9th Cir. 1987). "Courts will deny Rule 56(f) discovery applications where the moving party's evidence affirmatively negates the factual issues which the opposing party claims remain controverted." *Id.* The burden is on the party seeking to conduct additional discovery to put forth sufficient facts to show the evidence sought exists. *Id.*; *Visa Int'l Serv. Ass'n v. Bankcard Holders of America*, 784 F.2d 1472, 1475 (9th Cir. 1986). Clearly, one may not defer consideration of a motion for summary judgment pending further discovery where the facts which the non-moving party wishes to discover would not preclude summary judgment. *Vote v. United States*, 753 F. Supp. 866 (D. Nev. 1990), *aff'd*, 930 F.2d 31 (9th Cir. 1991); *accord Monahan v. Wolff*, 585 F. Supp. 1198, 1201 (D. Nev. 1984).

In this case, Petitioner failed to explain to any court what facts were being sought and how they were to be obtained, how those factual reasons could be expected to create a genuine issue of material fact, what efforts Petitioner made to obtain those facts and why he was not

successful in those efforts. *See Hudson River Sloop Clearwater, Inc. v. Dept. of Navy*, 891 F.2d 414, 422 (2nd Cir. 1989). His failure to do so was fatal to his request.

More importantly, he failed to attach the affidavit required by Rule 56(f). The failure to comply with this aspect of Rule 56(f) vitiates the request thereunder. *See Radich v. Goode*, 886 F.2d 1391, 1393-95 (3rd Cir. 1989). A simple request for discovery in a memorandum is no substitute for the requisite Rule 56(f) affidavit. *Armoteck Industries, Inc. v. Freedman*, 790 F. Supp. 383, 395 (D. Conn. 1992). The failure to comply with these technical yet important provisions of Rule 56(f) renders his request, *ab initio*, invalid. Therefore, Petitioner's complaint that Rule 56(f) should have provided him a shield from summary judgment is fallow.

III. DENIAL OF THE MOTION FOR RECONSIDERATION WAS JUSTIFIED

Finally, the only matter to be appealed is whether the Motions for Reconsideration were properly denied.

Although the term "Motion for Reconsideration" is not mentioned in the Federal Rules of Civil Procedure, the motion is not uncommon in Federal practice. "Reconsideration, as generally used, is a reconsideration by the same Court at which the original determination was made." *Above-The-Belt, Inc. v. Merrill Bohannan Roofing, Inc.*, 99 F.R.D. 99, 101 (E.D. Va. 1983).

> The motion for reconsideration would be appropriate where, for example, the Court has patently misunderstood a party, or has made a decision outside the adversarial issues presented to the Court by the parties, or has made an error

> not of reasoning but of apprehension. A further basis for a motion to reconsider would be a controlling or significant change in the law or facts since the submission of the issue to the Court. Such problems rarely arise and the motion to reconsider should be equally rare.

Id.

There is no question that reconsideration can be sought pursuant to F.R.C.P. 59(e). However, to avoid being frivolous, the motion must provide a valid ground for reconsideration. *NGIC Indemnity Corp. v. Weisman*, 803 F.2d 500, 505 (9th Cir. 1986). It must do two things: "First, it must demonstrate some reason why the Court should reconsider its prior decision. Second, it must set forth facts or law of a strongly convincing nature to induce the Court to reverse its prior decision." *Great Hawaiian Financial Corp. v. Aiu*, 116 F.R.D. 612, 616 (D. Hawaii 1987).

Courts have distilled three major grounds justifying reconsideration: (1) an intervening change in controlling law; (2) the availability of new evidence; and (3) the need to correct a clear error or prevent manifest injustice. *Kern-Tulare Water Dist. v. City of Bakersfield*, 634 F. Supp. 656, 665 (E.D. CA 1986); *see Major v. Benton*, 647 F.2d 110, 112 (10th Cir. 1988). It is inappropriate for a party bringing a Motion for Reconsideration before the Court to simply rehash the same arguments in the original briefing found inadequate by the Court. *Settino v. City of Chicago*, 642 F. Supp. 755, 760 (N.D. Ill. 1986).

To the extent new evidence is submitted, an explanation must be given as to why such evidence was not provided in the original submission. *Publishers Resource v. Walker-Davis Publications*, 762 F.2d 557, 561 (7th Cir.

1985). Indeed, the movant is **obliged** to show not only this evidence was newly discovered or unknown until after the hearing, but also that it could not with reasonable diligence have discovered and produced such evidence at the original hearing. *Engelhard Industries, Inc. v. Research Instrumental Corp.*, 324 F.2d 347, 352 (9th Cir. 1963), *cert. denied*, 377 U.S. 923 (1964). If the proffered evidence was available before disposition of Summary Judgment, then the movant is not entitled to reconsideration based upon that evidence. *Trentacosta v. Frontier Pac. Aircraft Indus.*, 813 F.2d 1553, 1557-58 n.4 (9th Cir. 1987).

Petitioner's Motions for Reconsideration presented no new law or evidence which could not have been presented prior to dismissal. He showed no reason as to why, if any additional facts were available to clarify his position, they were not raised before the Court in opposing the Motion for Summary Judgment. Clearly, Petitioner failed to meet any of those goals and therefore a refusal to consider his regurgitated pablum was appropriate.

CONCLUSION

For the foregoing reasons this Court is respectfully requested to deny Petitioner's request for Writ of Certiorari and, instead, allow the Ninth Circuit decision to stand unmolested.

Respectfully submitted this 17th day of September, 2003.

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Supreme Court, U.S.
FILED
SEP 26 2003
OFFICE OF THE CLERK

No. 03-264

IN THE

SUPREME COURT OF THE UNITED STATES

JOHN DAVID GEREMIA

Petitioner

vs.

LAS VEGAS METROPOLITAN POLICE DEPARTMENT; DETECTIVE T. BALL;WILLIAM TULLOS;JOANN TULLOS; and WILLIAM MOMA,

Respondents

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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5 pp

INTRODUCTION

The decision of the Ninth Circuit should not be allowed to stand, because it incorrectly suggests that a police department need only to assert that charges were filed by a District Attorney without presenting any evidence that charges were filed. The decision also suggests that a police department can properly hide exculpatory evidence (signed statements from the alleged victims).

REASONS FOR GRANTING THE WRIT

I. TO THIS DAY RESPONDENTS POLICE DEPARTMENT HAVE NOT PRODUCED ANY DOCUMENTS PROVING THAT THE DISTRICT ATTORNEY FILED CHARGES, YET PETITIONER HAS PRODUCED AN ABUNDANT AMOUNT OF DOCUMENTS WHICH WOULD SUPPORT A DENIAL TO FILE CHARGES BY THE DISTRICT ATTORNEY.

Item 1 of Respondents **ISSUES PRESENTED FOR REVIEW** implies that somehow the Ninth Circuit made its ruling because a judge issued warrants or filed charges and this is simply not true. The Ninth Circuit ruled the police and Detective Ball were immune because the District Attorney filed charges without any documented proof.

II. THE NINTH CIRCUIT SUSTAINS THE HIDING OF EXCULPATORY EVIDENCE AND SELECTIVE INVESTIGATIONS BY A POLICE DEPARTMENT.

Contrary to Item 2 of Respondents issues Petitioner's demand for discovery had a great deal of factual support. Sworn Trial testimony in pertinent part was presented to the Honorable Supreme Court that bears out that three of the alleged victims gave signed statement that the Police Department failed to provided either at criminal trial or Civil Discovery. Clearly the Police Department had a duty to produce the complete file and all statements but rather they chose to be selective and only produce the signed 'affirmation' of one statement (that of Joan Tullos). This violates petitioners right to due process.

III. AS TO RESPONDENTS REMAINING ISSUES PRESENTED FOR REVIEW ITEMS 3 AND 4.

Justice Black of the United States Supreme Court said it best in **Conley v. Gibson, 355 U.S. 41 at 48 (1957);**

"The Federal Rules rejects the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accepts the principle that the purpose of pleading is to facilitate a proper decision on the merits." According to rule 8(f) FRCP all pleading shall be construed to do substantial justice."

IV. ONCE AGAIN RESPONDENT BASES THEIR WHOLE ARGUMENT ON CASE LAW INVOLVING A WARRANTLESS ARREST YET ALL THE ARREST WERE BY WARRANT AND SELECTIVE QUOTING OF LAW.

The Defendant hopes that this Honorable Supreme Court would believe that Detective Ball had to promptly act by obtaining an arrest warrant even though the District Attorney had refused to issue one on three separate occasions. They then somehow argue that the Police had to arrest on warrants supported by evidence they selectively chose to produce or obtain. The Petitioner submits to this Honorable Supreme Court he was unable to Litigate this complaint because the police have not produced statements and co-defendants refused to set for depositions.

The respondent also cites to Rule 56 but does not mention Rule 60.

The respondent also cites to Nevada Revised Statute 41.035 in regards to a $50,000 cap for punitive damages but does not mention NRS 41.034(2)(b) which excludes this cap when the damage results from deprivation of any rights secured by the Constitution of the United States.

V. - IF THIS HONORABLE SUPREME COURT DENIES THIS WRIT OF CERTIORARI IT WOULD BE ALLOWING A POLICE DEPARTMENT TO RAILROAD A SUSPECT AND HAVE HIM CHARGED AND CONVICTED BY HIDING EVIDENCE AND SELECTIVELY OBTAINING EVIDENCE AND OBTAINING WARRANTS WITHOUT THE PREREQUISITE OF OBTAINING SWORN STATEMENTS WHICH WOULD SUPPORT AN ARREST WARRANT.

To this day no Sworn Statements have been provided nor documents supporting the theory that the District Attorney filed charges even though the Writ of Certiorari challenged the Police Department to produce these documents.

CONCLUSION

The Court should grant this petition and it is the Petitioners belief based on prior cases that the Police Department's behavior of hiding evidence should be met with an Order instructing the lower court to set this matter for trial. This Honorable Court is also requested to rule on punitive damages in regards to NRS 41.035 and NRS 41.0334 (2) (b). which was argued in Respondent's Response at page 10.

Respectfully submitted,

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Petitioner in Pro Se